(27,125)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 1039.

THE NEW YORK CENTRAL RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

MICHAEL BIANC. 374

IN ERROR TO THE SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT, OF THE STATE OF NEW YORK.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 4, 1919.

2 *Employee's Claim for Compensation.*

State Industrial Commission.

Principal Office: The Capitol, Albany, N. Y.

Division of Claims.

Claim No. 22635A. Case of Michael Bianc.

Having first presented a claim to my employer and not having within ten days thereafter reached an agreement with him for payment of compensation, I hereby present my claim to the State Industrial Commission for compensation for disability resulting from an accident arising out of and in the course of my employment and not occasioned by my wilful intention or solely through intoxication, and in support of it I make the following statement of facts:

Name of injured person: Michael Bianc.

Address (Street and number): 7 Corning St. (City or village and county): West Albany.

Sex: Male. Age: 22. Nationality: Italian. Speak English? Yes. Married? Single.

Date of accident: Dec. 18, 1916. Hour of day: 10 A. M.

On what date were you compelled to stop work as result of this injury? Dec. 18, 1916.

Exact location of place where accident happened? Roundhouse, West Albany Shops.

Was it at the plant or away from it? At the plant.

State occupation when injured: Machinist's helper.

How long have you worked at this occupation? 5 years.

How long have you worked for present employer? 5 years.

Were you doing your regular work when injured? Yes.

3 Piece or time worker? Time. Wages per full day? $2.12—7 days' wk. but time and a half for Sundays.

How did accident happen? Working under engine slipped back against kerosene torch, setting clothes afire.

State fully nature of injury: Burns of head, limbs and body.

Name of employer: New York Central R. R. Co.

Office address: Grand Central Terminal, N. Y. City.

Nature of business: Railroad.

Have you returned to work? Yes.

If so, when? Will advise later.

Have you received any wages (this does not mean compensation) since the date of your accident? Yes, since resuming work for another employer.

Will you be able to take up regular employment when you return to work? Yes.

Name of attending physician: Dr. Edgar Vander Veer. Address: Cor. Eagle and State Sts., Albany.

If taken to hospital, give name and address of hospital and date: Homeopathic Hospital.

Did you request your employer to provide medical attendance? No.

Has he done so? Yes.

Signed, this 21st day of November, 1917, at Albany, N. Y.

MICHAEL BIANC,
(Claimant sign full name here.)
7 Corning St., West Albany.
(Address to which mail should be sent.)

4 STATE OF NEW YORK,
City & County of Albany, ss:

On this 21st day of November, 1917, personally appeared before me the undersigned, a Commissioner of Deeds in and for the said City and County and State, the above named Michael Bianc, to me well known, and to whom I have read the foregoing questions and answers, and all the matter above stated, and who, after being fully advised in the premises, subscribed his name thereto in my presence, and made oath that the foregoing statements, and each and all of them, are full and true, and are made without reservation or concealment

AMBROSE J. O'NEILL.
Post-office Address: Albany, N. Y.

5 *Attending Physician's Report.*

State Industrial Commission.

Principal Office: The Capitol, Albany, N. Y.

Division of Claims.

Claim No. 22635A.

All questions in this blank should be answered, and the report should contain an account of all injuries, no matter how trivial. Fill out blank in ink, using pen or typewriter, and mail promptly to the Commission at its Albany office.

1. Name of injured person: Frank Bianc. Address: 7 Corning St., West Albany.
3. Date of accident: Dec. 18, 1916, at 10 A. M. Was first treatment rendered by you? Yes.
6. Was injured person removed to hospital? Yes. Name of hospital: Homeopathic. Address: Albany, N. Y.
7. Give an accurate description of the nature and extent of the injury: Burn of back of head and back.
8. Describe the treatment: Unquentine dressing. Ears encased and pus drained out.
9. Are the symptons from which he is suffering due entirely to this injury? Yes.

10. Is he able to attend to any part of present or any other occupation? Yes.

11. Has the injury resulted in a permanent disability or disfigurement of head or face? Yes. If so, what? (Permanent disability, such as loss of whole or parts of fingers, etc., must be accurately marked on diagram.) Both ears distorted by burns.

12. Has previous sickness, injury or disease contributed to his disability? No.

14. For what period, from the date of accident (not from
6 date of this report), is disability likely to exist? A. From the surgical viewpoint? 52 weeks.

15. State, in patient's own words, how accident occurred: Fell on kerosene torch.

E. A. VANDER VEER, M. D.,
Per JAMES S. LYONS, M. D.,
Attending Physician,
247 *Quail Street, Albany, N. Y.*
(Address.)

Graduate of Albany Medical College, Year 1915.

Dated at Nov. 23, Albany, N. Y., 1917.

7 ***Medical Examiner's Report.***

STATE OF NEW YORK:

State Industrial Commission.

Principal Office: The Capitol, Albany, N. Y.

New York Office: 230 Fifth Avenue.

Bureau of Claims, Medical Division.

In re Claim No. 22635.

Claimant—Michael Bianc.
Employer—N. Y. Central.
Carrier—Self.
Injured—Dec. 18/16.

Examination by Dr. H. B. Boyle, Dec. 12/17.

Examination of Occipital region shows entire loss of hair due to a severe burn with resultant scar over the entire surface of Occipital bone. Said scar is not adherent.

Examination of entire back shows pigmentation of skin due to burns which have since healed with no functional defects.

Examination of right thorax or axillary line, shows an adherent scar about 3 inches in diameter due to severe burns which have since

healed. This scar is painful in the manipulation of arms above the clavicular line and in ordinary movements of chest.

There is also evidence in the right gluteal region of an extensive scar about three inches in diameter due to severe burn which has since healed. This scar causes pain after prolonged sitting or in some movements of right leg.

Examination of both ears shows a marked deformity as the result of severe burns which are now healed.

Claimant is entitled to compensation for marked cosmetic disfigurement in the Occipital region and for pain caused by scars on right thorax and in the right gluteal region.

8 Claimant is now able to resume work.

DR. H. B. BOYLE,
Medical Examiner.

The Medical Bureau hereby approves a period of — weeks — days disability from date of injury.

(Signed) ——— ———.

Date ——— — ———.

Copy sent to N. Y. C. Dec. 12/17.

9 *Notice of Award of Compensation.*

State Industrial Commission.

Principal Office: The Capitol, Albany, N. Y.

Claim No. 22635A.

Date, December 28, 1917.

To the New York Central R. R. Co., Employer, Grand Central Terminal, New York City, and Michael Bianc, Employee, 7 Corning St., West Albany, N. Y., and Self Insurance Carrier:

You are hereby notified that at a meeting of the State Industrial Commission held Dec. 19, 1917, Room 518, Capitol, a decision and award of compensation was made in the above matter, as follows: $433.44 for 48 weeks' disability at $9.03 per week (this does — include first two weeks for which compensation is payable only in cases in which disability has lasted more than forty-nine days), and the case was Closed.

The employer is hereby directed, in accordance with the provisions of the Workmen's Compensation Law, to pay the above award to the employee in the following manner: $433.44 at once for period from 1-1-1917 to 12-14-1917 and the balance (if any) periodically, in accordance with the method of payment of wages of the employee at the time of injury.

The above copy of the decision and award is sent to you pursuant to sections 20 and 23 of the Compensation Law.
Worked 10 days between 1-1-17 and 12-17-17.

STATE INDUSTRIAL COMMISSION.
JOHN MITCHELL, *Chairman.*

Attest:
WILLIAM S. COFFEY, *Secretary,*
By A. VANALLEN, *Chief of Claims.*
McLEAN.

10 22635, Michael Biano: N. Y. C. R. R. Co. Self.

Former award rescinded claimant to bring action under Federal Employers' Act.

Mr. Grover: In accordance with my previous statement at last hearing of this case, I desire to state that we withdraw any previous contention that this man was engaged in interstate commerce at the time of his accident, and as a rigid investigation fails to develop any evidence supporting any contention that he was engaged in interstate commerce.

January 9, 1918.

State Industrial Commission.

Principal Office: The Capitol, Albany, N. Y.

New York Office: 230 Fifth Avenue.

Notice of Award.

Claim No. 22635, N. Y.

Date, Jan. 16, 1918.

To New York Central R. R. Co., Employer, Grand Central Terminal, N. Y., and Michael Biano, Employee, 7 Corning St., West Albany, N. Y., and Self Insurance Carrier:

You are hereby notified that at a meeting of the State Industrial Commission, held January 9, 1918, a decision and award of compensation was made in the above matter as follows:
Former award rescinded claimant to bring action under Federal Employers' Act.
11 $— for — weeks' disability at $— per week (this does — include first two weeks for which compensation is payable only in cases in which disability has lasted more than forty nine days), and the case was closed.
$— per week for a period of — weeks, beginning —— —, 191—.
The employer is hereby directed in accordance with the provisions

of the Workmen's Compensation Law, to pay the above award to the employee in the following manner:

$— at once for period from —— —, 191—, to —— —, 191—, and the balance (if any) periodically, in accordance with the method of payment of wages of the employee at the time of injury.

The above copy of the decision and award is sent to you pursuant to Section 20 and 23 of the Compensation Law.

STATE INDUSTRIAL COMMISSION.
JOHN MITCHELL, *Chairman.*

Attest:
WILLIAM S. COFFEY, *Secretary,*
By A. VAN ALLEN, *Chief of Claims.*
C. MUNGER.

NOTE.—Correspondence should be addressed to 230 Fifth Avenue, New York City.

To the Claimant:

Call at the office of the insurance carrier given above, to collect the amount of award.

12 April 11, 1918.

Re Albany, No. 22635, Michael Biano—N. Y. Central R. R. Co.

To Mr. Frank V. Whiting, c/o the New York Central R. R. Co., Grand Central Terminal, New York City; to Mr. Michael Biano, 7 Corning Street, West Albany, New York; to Mr. Edwin W. Sanford, 71 State Street, Albany, N. Y.:

The above case was presented to the Commission in Session on Monday, April 8, 1918, for consideration as to disfigurement, and whether an award can be made.

After careful consideration of the papers in the case, and the testimony taken at this Hearing, a resolution was passed to the effect that the award made on December 19, 1917, for 48 weeks' compensation at $9.03 a week, amounting to $433.44 be re-instated, and in addition the claimant was awarded $1,500.00 for serious facial and head disfigurement, and the case closed.

The claimant will no doubt receive a check covering the compensation due, direct through the office of the Employers mentioned above, in the course of the next few days, for which a proper receipt should be secured, and same sent to this Office, to enable us to keep a correct record of the compensation paid. If, however, the compensation awarded is not paid within a reasonable length of time, the Claimant is requested to so advise Mr. Edward B. Wickham, and his case will be given further attention.

Yours truly,

—— ——, *Secretary.*

E. B. W./R. B.

13 *Minutes of Hearing.*

State Industrial Commission.

Albany, 22635.

MICHAEL BIANC

vs.

N. Y. CENTRAL RAILROAD Co.

Self Insurance.

Minutes of Hearing at 230 Fifth Avenue, New York City, Monday, April 8, 1918.

Before Commissioners Lyon, Sayer and Wiard.

Appearances:

Mr. Michael Bianc, claimant.
Mr. E. W. Sanford, 71 State Street, Albany, N. Y., for the claimant.
Mr. O. W. Brown, for the railroad company.

Mr. Brown: This case came on some time ago. In the first place, this man was injured, as you will notice, on the 18th of December, 1916. The case came on at Albany and an award was made on the 19th of December, 1917, forty-eight weeks, total $433.44. That was made, I believe on the report of physical examination made by your Dr. Boyle, who said on the 12th of December, 1917, that claimant was ready for work. Now, we have not been disposed to raise any question on the case at all, but have been disposed to pay the award because he was apparently laid up as a general proposition up to about that time. He had done some work for a contractor, I believe, prior to that time, and about ten days deducted by Mr. Abbott in computing that award.

14 Clerk of Session: It shows that he worked ten days between January 1st and December 17th; he worked about ten days.

Mr. Brown: Now, this man never served any notice whatever in this case. Now, we haven't any disposition to dispute the man's right to compensation; nor have we a disposition to dispute the question of notice at all. But if he is going to continue the proposition of refusing compensation and threaten law-suits and things like that, we might just as well raise all the questions that are to be raised in this case. Up to this time there is no notice whatever.

Com. Lyon: Have you offered him compensation?

Mr. Brown: Sure. We tried to pay it to him the day that the award was made.

Com. Lyon: Why doesn't he take it?

Mr. Sanford: The proposition that comes before us at this time is the matter of disfigurement.

Com. Lyon: What has that to do with his taking compensation?

Mr. Sanford: I don't know that that will have anything particular to do with it. It seems there was some question before I came into the matter about whether he had a case under the Federal law.

Com. Lyon: Of course, if he has he cannot get compensation.

Mr. Sanford: Since I came into the case, I have become convinced myself that there is no—it is purely a case for this Commission to pass upon.

Mr. Brown: I think Mr. Sanford is right. I think there may have been some doubt of that at the start. I think we might have established that if we had full knowledge at the start and examined into it; but in order to determine that we have to make an early investigation, which we did not do in this case.

Mr. Sanford: I think he has thoroughly decided that this is his only place. That is why we are here now. But under the special act provided for it some six months before he was injured, the Commission make an allowance for disfigurement. We are simply waiting for you to examine the claimant.

Com. Lyon: What is his disfigurement?

Mr. Sanford: He is the best exhibit there is of that. Of course, his whole body is scarred and disfigured; he was burned.

(Claimant submits to physical examination by the Commission).

Com. Lyon: The Court provides for facial or head disfigurement, not the body.

Examination of Claimant.

By Mr. Brown:

Q. When did you go to work, Mike?
A. When? This last time?
Q. Yes.
A. That I couldn't tell you.
Q. About when?
A. About three months.
Q. Been working about three months the last time?
A. Yes.

Com. Lyon: The award made up to December 14, 1917, for forty-eight weeks?

Mr. Brown: Yes; at that time Dr. Boyle said he was now ready for work.

Mr. Sanford: He went back to work and tried to work, that ten days—he tried to work but had to give it up.

Com. Lyon: What do you say about this disfigurement? (addressing Mr. Brown).

Mr. Brown: I am opposed to any award for disfigurement unless that disfigurement is the cause of disability.

Mr. Sanford: There is nothing in the law that I can see that confines it to that view.

16 Com. Lyon: We have always thought it ought to have some relation to a man's ability to work. There ought to be some relation between his ability to earn wages—I think this disfigurement is likely in the course of time to hinder his getting the wages that he otherwise would. Have you (addressing Mr. Brown) seen the back of his head? Here is a young man with all the probabilities before him; his hair is off on the back.

Mr. Sanford: His hearing is affected too.

Com. Lyon: I understand they found there was no relation between disfigurement and his ability to earn wages. Can you (addressing claimant) hear as good as before?

Claimant: I can hear, but mornings I can't hear a thing; not every morning, but some mornings I can't hear a thing; not always, but most every morning.

Com. Lyon: I think he is entitled to some disability for that.

Mr. Brown: I wouldn't think he was entitled to anything but his compensation up to the time he went back to work. I think it has been found by the doctors that there is no relation between the disfigurement and the man's ability to work.

Com. Lyon: Of course, it is impossible to state just how much that would interfere with his earning—a young man like him that has got to go all his life.

Mr. Brown: That is true, but that remains with the continuing power of the Commission to make an adjustment of subsequent years.

Mr. Sanford: Possibly that wouldn't prevent his "doping" up engines, the work he was doing when he was hurt, but nobody would presume that the boy would continue to "dope" engines.

Mr. Brown: No, but his work is of a laborious nature, and he has been able to do that sort of work since he was hurt.

17 Com. Lyon: How much education have you had? (Addressing claimant.)

Mr. Sanford: Went through grammar school, didn't you?

Claimant: Yes, sir, eighth grade.

Mr. Brown: Born in this country?

Claimant: Yes, sir.

Mr. Brown: How old are you now?

Claimant: Twenty-three.

Mr. Brown: What work have you done since you left school—where have you been working—different places?

Claimant: I worked at Carr Bros. grocery store; I worked on a farm; I worked down at Drislane's; I worked in the West Albany stock yard.

Mr. Brown: You worked in the engine house at the time you were injured?

Claimant: Yes, sir.

Com. Lyon (addressing Mr. Sanford): How much do you think he ought to have for disfigurement?

Mr. Sanford: I think he ought to have a very liberal allowance.

Of course, the limit is $3500. That would not be too much if the case would get to jury on a case of that kind.

Com. Lyon: No, but you take the chance of getting nothing. On what a man would get before a jury in the way of a sympathetic proposition—that is a different proposition entirely.

Mr. Sanford: Here is a young man just starting in life with all the possibilities of life before him; he will carry that disfigurement.

Mr. Brown: The chief burden is on the young fellow himself in the injury to his feelings. It is not to his earning capacity by any means.

Mr. Sanford: It is to his ability to obtain employment. People do not care to have disfigured people employed.

18 Mr. Brown: Not in the condition he is in.

Com. Lyon: You would hesitate about putting that man in the office with other men.

Mr. Sanford: He is really barred from the general public as a place of employment.

Claimant: I have a scar on my side; I can hardly do no heavy work. I suppose you know about that, all the way around the side, skin overgrown, that I can't lie on it or anything else.

Mr. Sanford: He hasn't fully recovered from those injuries.

Com. Lyon: Of course, so far as disability is concerned, when he gets back earning his old wages, that has to stop.

Mr. Brown: You know that award was rescinded, Mr. Lyon.

Com. Lyon: Why?

Mr. Brown: I can't tell you except this.

Mr. Sanford: It was held in abeyance really.

Mr. Brown: We got notice that the award was rescinded. On January 9, 1918, Mr. Abbott sent us notice that the former award was rescinded, claimant to bring action under the Federal Employers' Liability Act. Now, that is something we don't know about. As I understand it—I may say this: I have heard this and it is just pure hearsay: Mr. Bianc and some man from Albany, who wasn't Mr. Sanford, went to Mr. Abbott and said he didn't want compensation, that he wanted to sue under the Federal Act, and they wanted that award rescinded.

Com. Lyon: I understand you have definitely decided now that you will take compensation and not rely on your rights under the Federal Act.

Claimant: I don't know what you said.

Com. Lyon: I understand you now want to take compensation and not rely on any rights you have got under the Federal law. Of course, you have to make your decision; you can't have both.

19 Mr. Sanford: That is the way I understand it.

Com. Lyon: You better go on record one way or the other. That is what you want now, isn't it?

Claimant: Why, yes.

Com. Lyon: That being so, let the records show that he is given compensation up to the date when he went back to work.

Mr. Sanford: What time did you go back to work?
Claimant: It is about three months ago.
Mr. Brown: Was it New Year's day?
Claimant. It was before New Year's.
Mr. Brown: Then some time in December?
Mr. Sanford: Before Christmas?
Claimant: No, after Christmas.
Mr. Sanford: Between Christmas and New Years?
Claimant: Yes.

Mr. Brown: I think that award is about right.

Com. Lyon: Previous award will be reinstated and the case closed so far as compensation is concerned. If that trouble with your side does get sometime where it stops your working, you can come back and ask to have the case reopened.

Com. Lyon: What about the disfigurement?

Mr. Brown: I don't think he is entitled to anything.

Com. Lyon: Well, I do.

Mr. Brown. Unless it is established that it has some relation to his earnings.

Com. Lyon: I don't know what the other commissioners would say about it, but I am convinced that he is entitled to compensation for that. I shouldn't think we ought to go to $3500. The back of the head is bad enough, but the ears in addition to that—I should think he ought to have $1000.

Mr. Brown: I couldn't consent to that.

Com. Lyon: Ask the other commissioners to come in here. (To this time only Com. Lyon had been present.)

Mr. Brown: There is a real question of notice in this case, as this accident happened on December 18, 1916 and November 26, 1917, is the first notice we had.

Com. Lyon: If they put the fire out with a hose it must have been pretty well known.

Mr. Brown: No question about that. He went to the hospital and was attended in the usual way.

Mr. Sanford: Four months and a half in the hospital.

Mr. Brown: The advantage of having notice is that one has an opportunity to look up all the points in a case. Now, we think if we had known there was a claim for compensation in this case, within the legal time, we would have had an opportunity to have investigated as to whether or not it was a Federal case. That certainly was not made.

Com. Lyon: Don't you suppose you did investigate?

Mr. Brown: We have absolutely lost the record. I had an investigation made but we couldn't find what the records were.

Mr. Sanford. You know this—that this engine was in the yard for repairs.

Mr. Brown: I will concede that.

Mr. Sanford: Your company certainly has a record of every place that engine has been put. You know the number of the engine; you

know it was run into the shop for repairs; you know it was being doped up.

Com. Lyon: Physical examination shows that scars on the back of the head and neck have entirely denuded his head from his hair, at least half way up his head in the rear, and there are serious
21 burns to both ears by which they are shriveled. The ears are badly shriveled but have healed. He states in the morning it is difficult for him to hear.

(Com. Wiard enters and examines claimant.)

Mr. Brown: Will you consent to a photograph going into the record?

Mr. Sanford: Sure.

Mr. Brown: Or a series of photographs showing just what they are.

Com. Lyon: Certainly.

Mr. Brown: I question the fact of this finding.

Mr. Lyon: If you have pictures taken, you ought to have pictures taken of the back of his head and both sides?

Mr. Brown: I should say about three pictures.

(Com. Sayer enters.)

Com. Lyon (addressing Com. Sayer): Look at that disfigurement.

Com. Sayer: How does it affect your hearing on this side?

Claimant: I can't hear a thing hardly in the morning both sides.

Com. Lyon: You can hear pretty well now?

Claimant: I can hear good during the day, only in the morning; sometimes gets me around the noon hour.

Com. Sayer: My view of the facial disfigurement provision of the law is that it is practically in lieu of damages.

Mr. Brown: Then I object that it is contrary to the spirit of compensation entirely. When you rule that compensation is damages you rule contrary——

(All three commissioners confer.)

Com. Lyon: My friends here are rather higher priced than I am.

Mr. Brown: I assume that as far as compromise is con-
22 cerned we would be perfectly willing to compromise on the question of paying some compensation, but if it is going to be a high amount I am frank to say we will have to take the case up.

Com. Sayer: A good deal depends upon the definition of "high."

Mr. Brown: I am considering between nothing and Mr. Lyon's level, and now you are both higher than that.

Com. Sayer: The concensus seems to put it at $1500.

Mr. Brown: I couldn't consent to that.

Com. Lyon: In case there is an appeal photographs shall be made and put in the appeal book. Everybody consents to that, I take it—of the back of the head and both sides of the face. Mr. Sayer suggests that we have Dr. Lewy put a description of the injury right into the record.

Mr. Brown: With measurements?

Com. Lyon: Yes, and with description. Suppose you (addressing claimant) go back to our doctor and let him make it in writing and file it in the record.

Mr. Brown: I have a right to reserve all kinds of objection here as far as the record is concerned.

Mr. Sayer: I think you have.

Com. Lyon: If there is any question about notice, I think the record ought to be full. It ought to appear here that he was so badly burned that you sent him to the hospital yourselves.

Mr. Brown: Yes, but it further appears that he went to the hospital and the first we heard of the case as far as the notice was concerned was November 26th.

Com. Lyon: Let the records show that he was burned by a torch and the employer was compelled to turn a hose on him in order to extinguish the fire, and they were obliged to take him to a hospital where he was for four and a half months.

23 (Claimant returns from examination in our medical department.)

Com. Sayer: Dr. Lewey's description of the injury as presented to the Commission is considered by the Commission previous to the award for the facial disfigurement.

M. Simmons, Hearing Stenographer.

24 *Medical Bureau's Report.*

STATE OF NEW YORK:

State Industrial Commission.

Principal Office: The Capitol, Albany, N. Y.

New York Office: 230 Fifth Avenue.

Bureau of Claims, Medical Division.

In re Case No. 22635.

Michael Bianc, 7 Corning St., West Albany, N. Y.

Self.

12/18/16.

Examination of body shows several scars in consequence of burns situated over the right side of the thorax in the axillary line which healed with kaloid scars; several superficial burns and extensive pigmented scars over both shoulder blades; also extensive scar over the right gluteal region. These scars although indicative of extensive burns do not interfere with the function of any of these parts. There is evidence of a very extensive scar over the entire occipital region

with loss of hair in consequence of destruction of all hair follicles. In addition to this scar there is a marked remaining external visible defect of both ears due to the defective scars following the destruction of the tissues of the ear shell. The outer ear canal is not involved in the scar tissues.

Claimant is able to distinctly hear sound of tuning fork but time of duration of sound is diminished. He also hears ordinary conversation.

April 8, 1918.

J. O. D. DR. R. LEWY.

The Medical Bureau hereby approves a period of — weeks — days disability from date of injury.

(Signed) DR. R. LEWY.

Date ——— —, ——.

25 *Objections to Award.*

Before State Industrial Commission.

Claim No. 22635.

In the Matter of the Claim of MICHAEL BIANO for Compensation under the Workmen's Compensation Law

against

THE NEW YORK CENTRAL RAILROAD COMPANY, Employer and Self-insurer.

STATE OF NEW YORK,
City and County of Albany, ss:

The above named employer and self-insurer hereby objects to the rendition of any award herein upon the following grounds:

1. That no notice of injury was given to said employer within ten days after disability, as prescribed by §18 of the Workmen's Compensation Law;

2. That to make to the claimant herein any award for facial or head disfigurement, under the provisions of §15 of the Workmen's Compensation Law, will be tantamount to making an award not for loss of earning power, but for damages, and will, therefore, deprive said employer of its property without due process of law, in contravention of the provisions of the Fourteenth Amendment to the Federal Constitution.

3. That to make to the claimant herein any award for facial or head disfigurement, under the provisions of §15 of the Workmen's Compensation Law will be tantamount to making an award not for

loss of earning power, but for damages, and will, therefore,
26 deprive said employer of its right to trial by jury, guaranteed by §2 of Article 1 of the constitution of the State of New York.

Dated April 8th, 1918.

NEW YORK CENTRAL RAILROAD COMPANY.
By O. G. BROWNE, *Attorney.*

27 *Synopsis of Claim.*

No. 22635.

Does claim come under law? Yes. Group 3.
Name of Employee: Michael Bianc.
Address of Employee: 7 Corning St., West Albany.
Name of Employer: The New York Central Railroad Co.
Insurance Carrier: Self.
Date of Injury: 12-18-16. Compensation commences 1-1-1917.
Nature and extent of injury: Burns on head & body.
Daily wages $2.12 multiplied by 332=$703.84 divided by 52= Average weekly wages $13.55. Two-thirds of weekly wages $9.03.
Estimated Disability 48 weeks and — days @ $9.03 weekly. Amount to be paid now $433.44 From 1-1-1917 to 12-14-17. (Worked ten days between 1-1-17 and 12-17-17.)
Continued or closed? Closed.
Date of hearing: Dec. 19, 1917.

GEO. A. MAGIN, *Examiner.*

Continuance.

Date of hearing: 1-9-1918.
Continued or closed? Former award rescinded.
If continued, to what date? Claimant to bring action under Federal Employers' Act.

GEO. A. MAGIN, *Examiner.*

As per Mr. Abbott's recommend.

Continuance.

Comm. in Sess.
Date of hearing, April 8, 1918.
The award made on Dec. 19th was re-instated, which was for 48 weeks, amounting to $433.44 from Jan. 1, 1917 to Dec. 14, 1917.
In addition to this award the Claimant was awarded $1500.00 for serious facial and head disfigurement.

EDW. B. WICKHAM, *Examiner.*

Notice sent.
Award No. 3866.

28 *Decision and Award.*

State Industrial Commission.

File No. 22635.

In the Matter of the Claim for Compensation, under the Workmen's Compensation Law, Made by MICHAEL BIANC

against

NEW YORK CENTRAL RAILROAD COMPANY, Employer and Self Insurer.

This claim came on for hearing before State Industrial Commission at Albany, New York, on December 10, 1917, December 19, 1917 and January 9, 1918, and at New York City on April 8, 1918.

Appearances:

Robert W. Bonynge, Esq., Counsel to State Industrial Commission.

Visscher, Whalen & Austin, Esqs., Attorneys for Employer and Self-insurer.

Edwin W. Sanford, Esq., Attorney for claimant.

All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its Conclusions of Fact, Ruling of Law, Award and Decision, as follows:

29 Conclusions of Fact.

1. On December 18, 1916, the day when Michael Bianc received his injuries, he resided at No. 7 Corning Street, West Albany, New York, and was employed by the New York Central Railroad Company engaged in the operation, including construction and repair of a railroad operated by steam power, and in the operation of car shops, machine shops and other work for the purposes of such railway, and to be used in connection with it when operated. Michael Bianc was employed as a machinist helper at the round house of the west Albany shops.

2. On said date, Michael Bianc was working for his employer at the round house of the West Albany shops, and while engaged in the regular course of his employment while working on an engine, which was in the round house for repairs, and whlie working under said engine, he slipped against a kerosene torch, and his clothes were thereby set afire, so that it was necessary for the employer to turn a hose on him, in order to extinguish the fire. He sustained burns to the head, limbs and body, which disabled him from working from the date of said injury to December 14, 1917, with the exception of ten days that he was able to work during that period.

The injuries received by Michael Bianc on said date also resulted in serious facial and head disfigurement. The nature of said disfigurement consists of an extensive scar over the entire occipital region of the head with loss of hair in consequence of the destruction of all hair follicles, and as a result of serious burns to both ears there is a marked external visible defect of each ear due to the defective scars following the destruction of the tissues of the ear shell, and both ears are badly shrivelled. Photographs of back of the head and both sides of the face are to be included as part of the record in this case.

3. The average weekly wage of Michael Bianc was the sum of $13.55.

4. The injuries sustained by Michael Bianc were accidental injuries and arose out of and in the course of his employment.

5. On December 18, 1916 and at the time of said accident Michael Bianc was not engaged in interstate commerce.

6. Written notice of injury was not given to his employer within ten days after disability, but the employer was aware of the accident at the time of the happening thereof it being necessary to turn a hose upon Michael Bianc to extinguish the fire, and by reason of said accident the employer was obliged to take Michael Bianc to a hospital, where, on account of said injury, he was required to remain for 4½ months; therefore, the employer was not prejudiced by the failure to give such written notice. The nature of the injury and the seriousness of the same constitute sufficient reason why written notice of injury could not be given to the employer within ten days after disability.

Ruling of Law.

This claim comes within the provisions of Chapter 67 of the Consolidated Laws, being Chapter 816 of the Laws of 1913, as reenacted and amended by Chapter 41 of the Laws of 1914, and amended by Chapter 316 of the Laws of 1914, and as further amended by the Laws of 1915 and 1916.

Award.

Award of compensation is hereby made against New York Central Railroad Company, Employer and Self-insurer, to Michael Bianc, injured Employee, at the rate of $9.03 weekly for the period of 48 weeks from January 1, 1917 to December 14, 1917, which is exclusive of the ten days that he was able to return to work during that period.

Award of compensation is further made against New York Central Railroad Co., Employer and Self-insurer, to Michael Bianc in the sum of $1500.00 account of and in view of the serious facial and head disfigurement resulting from the injuries sustained on December 18, 1916.

Decision.

The failure of Michael Bianc to give written notice of injury to his employer within ten days after disability is hereby excused on the ground that the employer was not prejudiced by such failure, and on the further ground that the nature and extend of the injuries sustained by Michael Bianc constituted sufficient reason why such written notice could not have been given.

Dated April 8, 1918.

STATE INDUSTRIAL COMMISSION,
EDW. P. LYON, *Vice-Chairman;*
HENRY D. SAYER,
LOUIS WIARD, *Commissioners.*

32 *Notice of Appeal.*

State Industrial Commission.

Claim No. 22635.

In the Matter of the Claim of MICHAEL BLANC for Compensation under the Workmen's Compensation Law

against

THE NEW YORK CENTRAL RAILROAD COMPANY, Employer and Self-insurer.

To the Attorney General of the State of New York; the State Industrial Commission; Hon. Robert W. Bonynge, Counsel to said Commission; Michael Bianc, claimant, 7 Corning St., West Albany, N. Y.:

Take notice that the New York Central Railroad Company, employer herein, hereby appeals to the Appellate Division of the Supreme Court, in and for the Third Judicial Department of the State of New York, from each and every part of the decision and award of the State Industrial Commission herein rendered April 8th, 1918.

Dated April 18th, 1918.

Yours, &c.,

VISSCHER, WHALEN & AUSTIN,
Attorneys for the New York Central Railroad Company.

Office and Postoffice Address, 126 State Street, Albany, N. Y.

33 *Certification of Record.*

I, William S. Coffey, Secretary of the State Industrial Commission, do hereby certify that I have compared the foregoing papers (except the Statement under Rule 41) with the respective originals

thereof on file in the office of the State Industrial Commission, and that the same are true and correct copies of said originals, and of the whole thereof, and that said papers constitute all of the papers and the proceedings herein, including the evidence, which were before said State Industrial Commission in relation to the foregoing claim.

In Witness Whereof, I hereunto set my hand and the official seal of the State Industrial Commission on the — day of July, 1918.

[L. S.] WILLIAM S. COFFEY,
Secretary State Industrial Commission.

34 *Order Settling Case.*

Ordered, that the foregoing printed record is hereby settled as and for the record upon the appeal herein taken to the Appellate Division of the Supreme Court, Third Department, and that said record be filed in the office of the Clerk of said Court.

Dated, New York City, N. Y., July —, 1918.

EDWARD P. LYON,
Vice-Chairman State Industrial Commission.

Affidavit of No Opinion.

STATE OF NEW YORK,
City and County of Albany, ss:

Robert E. Whalen, being duly sworn, deposes and says, that he is one of the attorneys for the appellant in this proceeding, wherein no opinion was written by the State Industrial Commission.

ROBERT E. WHALEN.

Subscribed and sworn to before me this 1st day of August, 1918.

EDITH L. JONES,
Notary Public, Albany County, N. Y.

35 *Appellate Division's Order of Affirmance.*

At a Term of the Appellate Division of the Supreme Court in and for the Third Department, Held at the Court-house, in the City of Albany, N. Y., Commencing on the 12th Day of November, 1918.

Present: Hon. John M. Kellogg, Presiding Justice.
" George F. Lyon,
" John Woodward,
" A. V. S. Cochrane,
" Henry T. Kellogg,
Associate Justices.

In the Matter of the Claim for Compensation, under the Workmen's Compensation Law, Made by MICHAEL BIANC, Employee, Respondent,

against

THE NEW YORK CENTRAL RAILROAD COMPANY, Employer and Self-Insurer, Appellant.

The above-named The New York Central Railroad Company having appealed from the award of the State Industrial Commission entered in the office of said Commission on the 8th day of April, 1918, whereby compensation was awarded to the above-named Michael Bianc, injured Employee, at the rate of $9.03 weekly for the period of 48 weeks from January 1, 1917, to December 14, 1917,
36 which is exclusive of the ten days that he was able to return to work during that period. Award of compensation is further made against New York Central Railroad Co., Employer and Self-Insurer, to Michael Bianc in the sum of $1,500.00 account of and in view of the serious facial and head disfigurement resulting from the injuries sustained on December 18, 1916; and said appeal having come on to be heard in this court, and having been argued by Robert E. Whalen, Esq., of counsel for the appellant, and E. C. Aiken Deputy Attorney General, for the State Industrial Commission, and due deliberation having been had thereon.

Now, on motion of Merton E. Lewis, Attorney General, attorney for the State Industrial Commission, it is,

Ordered, that said award of the State Industrial Commission appealed from be and the same is hereby unanimously affirmed.

JOSEPH H. HOLLANDS, *Clerk.*

A Copy.
[L. S.] JOSEPH H. HOLLANDS, *Clerk.*

37 *Order of Industrial Commission.*

Before the State Industrial Commission

In the Matter of the Claim of MICHAEL BIANC for Compensation under the Workmen's Compensation Law

against

THE NEW YORK CENTRAL RAILROAD COMPANY, Employer and Self-insurer.

The above-named New York Central R. R. Co. employer and self-insurer, having appealed to the Appellate Division of the Supreme Court in and for the Third Judicial Department, from the award and decision of the State Industrial Commission, made and entered herein on the 8th day of April, 1918, whereby compensation was awarded

the above-named Michael Bianc, at the rate of $9.03 weekly for a period of 48 weeks from January 1, 1917, to December 14, 1917, which is exclusive of the ten days that he was able to return to work during that period; and in the sum of $1,500.00 on account of and in view of the serious facial and head disfigurement resulting from the injuries sustained on December 18, 1916; and said appeal having been duly heard by said Court, and the Appellate Division of the Supreme Court having at a term thereof commencing on the 12th day of November, 1918, unanimously affirmed the award and
38 decision heretofore made by the State Industrial Commission, and the papers on appeal herein together with a certified copy of the said order of the Appellate Division having been duly filed; it is

Ordered, that the order of the Appellate Division be and the same hereby is made the order of the State Industrial Commission, and the award heretofore made herein be and the same hereby is affirmed with interest from April 8, 1918.

Dated, New York, Nov. 25, 1918.

W. S. COFFEY, *Secretary.*

39 *Notice of Appeal to Court of Appeals.*

Supreme Court, Appellate Division, Third Department.

In the Matter of the Claim of Compensation, under the Workmen's Compensation Law, Made by MICHAEL BIANC, Employee, Respondent,

against

THE NEW YORK CENTRAL RAILROAD COMPANY, Employer and Self-insurer, Appellant.

To Hon. Merton E. Lewis, Attorney General; Robert W. Bonynge, Esq., Counsel to State Industrial Commission; Edwin W. Sanford, Esq., Attorney for Respondent; Hon. Joseph H. Hollands, Clerk Appellate Division, Third Department.

SIRS: Take notice, that The New York Central Railroad Company, employer and self-insurer herein, hereby appeals to the Court of Appeals of the State of New York from each and every part of the order entered in the office of the Clerk of the Appellate Division of
40 the Supreme Court, in and for the Third Judicial Department, on the 19th day of November, 1918, affirming the decision and award of the State Industrial Commission herein rendered April 8th, 1918.

Dated, December 3rd, 1918.

Yours, &c.,

VISSCHER, WHALEN & AUSTIN,
Attorneys for Appellant.

Office and Post Office Address, 126 State Street, Albany, N. Y.

41 *Stipulation as to Record.*

Stipulated, pursuant to §3301 of the Code of Civil Procedure, that the foregoing printed copies of the Record in the Appellate Division, Appellate Division's order of affirmance, order of State Industrial Commission rendered thereon, and notice of appeal to the Court of Appeals are true and correct copies of the whole of the respective originals thereof, and that certification of said printed copies is hereby waived.

Dated, December 10th, 1918.

MERTON E. LEWIS, *Attorney General,*
By E. C. AIKEN, *Deputy.*
ROBERT W. BONYNGE,
Counsel to State Industrial Commission.
EDWIN W. SANFORD,
Attorney for Respondent.
VISSCHER, WHALEN & AUSTIN,
Attorneys for Appellant.

42 *Affidavit of No Opinion.*

STATE OF NEW YORK,
City and County of Albany, ss:

Robert E. Whalen, being duly sworn, deposes and says that he is one of the attorneys for the appellant in this proceeding, wherein no opinion was written by the Appellate Division.

ROBERT E. WHALEN.

Subscribed and sworn to before me this 12th day of December, 1918.

EDITH L. JONES,
Notary Public, Albany County, N. Y.

43 STATE OF NEW YORK, *ss:*

Court of Appeals.

Pleas in the Court of Appeals, Held at Court of Appeals Hall, in the City of Albany, on the 8th Day of April, in the Year of Our Lord One Thousand Nine Hundred and Nineteen, Before the Judges of said Court.

Witness, the Hon. Frank H. Hiscock, Chief Judge, presiding.
R. M. BARBER, *Clerk.*

Remittitur, April 9th, 1919.

In the Matter of the Claim for Compensation, &c., of MICHAEL BIANC, Employee, &c.

Be it remembered, That on the 23rd day of Decem' er in the year of our Lord one thousand nine hundred and eighteen, The New York Central Railroad Company &c., the appellant in this cause, came here into the Court of Appeals, by Visscher, Whalen & Austin, its Attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And State Industrial Commission & ano., the respondents in said cause, afterwards appeared in said Court of Appeals by Merton E. Lewis & ano., their attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

44 Whereupon, the said Court of appeals having heard this cause argued by Mr. Robert E. Whalen, of counsel for the appellant, and by Mr. E. C. Aiken, of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be, and the same hereby is affirmed, with costs, on authority of Matter of Sweeting v. American Knife Co. &c., decided herewith.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed, with costs &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division, Third Judicial Department, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division before the Justices thereof, &c.

R. M. BARBER,
Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office.

Albany, April 9, 1919.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

[SEAL.] R. M. BARBER, *Clerk.*

45 At a Term of the Appellate Division of the Supreme Court in and for the Third Department, Held at the Court-house, in the City of Albany, N. Y., Commencing on the 6th Day of May, 1919.

Present: Hon. John M. Kellogg, Presiding Justice; Hon. George F. Lyon, Hon. John Woodward, Hon. A. V. S. Cochrane, Hon. Henry T. Kellogg, Associate Justice.

In the Matter of the Claim for Compensation, under the Workmen's Compensation Law, Made by MICHAEL BIANC

against

THE NEW YORK CENTRAL RAILROAD COMPANY, Employer and Self-insurer, Appellant.

The above named The New York Central Railroad Company having appealed from the order of the Appellate Division of the Supreme Court, in and for the Third Judicial Department, made at a Term commencing on the 12th day of November, 1918, which affirmed an award of the State Industrial Commission entered in the office of said Commission on the 8th day of April, 1918, whereby compensation was awarded to the above named Michael Bianc, injured employee, at the rate of $9.03 weekly for a period of 48 weeks from January 1, 1917, to December 14, 1917, which is exclusive of the ten days that he was able to return to work during that period. Award of compensation was further made against the New York Central Railroad Company, employer and self-insurer, to Michael Bianc in the sum of $1,500.00 on account of and in view of
46 the serious facial and head disfigurement resulting from the injuries sustained on December 18, 1916, against which award for facial and head disfigurement appellant, when this cause was before this Court, contended that to make said award would be tantamount to making an award, not for loss of earning power, but for damages, and would, therefore, take the property of appellant without due process of law, in contravention of the provisions of the Fourteenth Amendment to the Constitution of the United States; and said appeal having been argued in the Court of Appeals by Robert E. Whalen, Esq., of counsel for the appellant, and E. C. Aiken, Deputy Attorney General, for the State Industrial Commission, and the Court of Appeals after due deliberation had thereon did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from be affirmed with costs; and further ordered that the record and proceedings be remitted to the Appellate Division of the Supreme Court, Third Judicial Department, there to be proceeded upon according to law; and the said remittitur having been filed in this Court,

Now, on motion of Charles D. Newton, Attorney General, attorney for the State Industrial Commission, it is

Ordered, that the order and judgment of the Court of Appeals be and the same is hereby made the order of this Court, and that the award or decision of the State Industrial Commission entered on the

8th day of April, 1918, be and the same is hereby in all respects affirmed with $99.50 costs to be paid by the appellant.

JOSEPH H. HOLLANDS, *Clerk.*

47 Supreme Court, Appellate Division, Third Department.

In the Matter of the Claim for Compensation, under the Workmen's Compensation Law, Made by MICHAEL BIANC, Employee, Respondent,

against

THE NEW YORK CENTRAL RAILROAD COMPANY, Employer and Self-insurer, Appellant.

It is hereby stipulated by and between the attorneys for the respective parties hereto, pursuant to Rule 8 of the Supreme Court of the United States, that the following portions of the record shall constitute the transcript of record on writ of error from the Supreme Court of the United States, and that the clerk shall transmit to the Clerk of the Supreme Court of the United States only the papers herein designated as follows:

Statement Under Rule 41;
Employee's Claim of Compensation;
Medical Examiner's Report;
Attending Physician's Report;
Notice of Award of Compensation;
Minutes of Hearing, April 8, 1918;
Medical Bureau's Report, April 8, 1918;
Employer's Objection to Award;
Synopsis of Claim;
Decision and Award;
Notice of Appeal to Appellate Division;
Certification of Record;
Order Settling Case;
Affidavit of No Opinion by Commission;
48 Order of Affirmance by Appellate Division;
Order of Industrial Commission thereon;
Notice of Appeal to Court of Appeals;
Stipulation as to Record in Court of Appeals;
Affidavit of No Opinion in Appellate Division;
Judgment of the Court of Appeals;
Order of Appellate Division entered on judgment of Court of Appeals.

Dated, May 19th, 1919.

VISSCHER, WHALEN & AUSTIN,
Attorneys for Appellant.
CHARLES D. NEWTON (E. C. A.),
Attorney General of the State of New York,
Attorney for Respondent.

49 [Endorsed:] Original. Supreme Court, Appellate Division, Third Department. In the Matter of the Claim, &c.,

made by Michael Bianc, Employee, Respondent, against The New York Central Railroad Company, Employer and Self-insurer, Appellant. Stipulation pursuant to Rule 8 of the U. S. Supreme Court. Visscher, Whalen & Austin, Attorney for Appellant, Office and Post-Office Address 126 State Street, Albany, N. Y.

50 Supreme Court, Appellate Division, Third Department.

In the Matter of the Claim for Compensation, under the Workmen's Compensation Law, Made by MICHAEL BIANC, Employee, Respondent,

against

THE NEW YORK CENTRAL RAILROAD COMPANY, Employer and Self-insurer, Appellant.

STATE OF NEW YORK,
Third Judicial Department, ss:

I, Joseph H. Hollands, Clerk of the Appellate Division of the Supreme Court, in and for the Third Judicial Department of the State of New York, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of Michael Bianc, employee, respondent, against The New York Central Railroad Company, employer and self-insurer, appellant, as set forth in the annexed stipulation, bearing date May 19th, 1919, and made pursuant to Rule 8 of the Supreme Court of the United States between the attorneys for the respective parties hereto, as the same now appear on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in the City of Albany, State of New York, this 19th day of May, 1919.

[Seal Supreme Court, Appellate Division, Third Department.]

JOSEPH H. HOLLANDS,
Clerk of the Appellate Division of the Supreme Court in and for the Third Judicial Department of the State of New York.

51 [Endorsed:] Original. Supreme Court, Appellate Division, Third Department. In the Matter of the Claim, &c., made by Michael Bianc, Employee, Respondent, against The New York Central Railroad Company, Employer and Self-insurer, Appellant. Authentication of Record. Visscher, Whalen & Austin, Attorneys for Appellant, Office and Post-Office Address, 126 State Street, Albany, N. Y.

52 Supreme Court, Appellate Division, Third Department.

In the Matter of the Claim for Compensation, under the Workmen's Compensation Law, Made by MICHAEL BIANC, Employee, Respondent,

against

THE NEW YORK CENTRAL RAILROAD COMPANY, Employer and Self-insurer, Appellant.

STATE OF NEW YORK,
Third Judicial Department, ss:

In obedience to the commands of the writ of error herein allowed May 14th, 1919, I herewith transmit to the Supreme Court of the United States a duly certified transcript of such portions of the record and proceedings in the above entitled cause as, in pursuance of Rule 8 of the Supreme Court of the United States, the attorneys for the respective parties hereto have by stipulation designated, with all things concerning the same.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in the City of Albany, State of New York, this 19th day of May, 1919.

[Seal Supreme Court, Appellate Division, Third Department.]

JOSEPH H. HOLLANDS,
Clerk of the Appellate Division of the Supreme Court in and for the Third Judicial Department of the State of New York.

53 [Endorsed:] Original. Supreme Court, Appellate Division, Third Department. In the Matter of the Claim, &c., made by Michael Bianc, Employee, Respondent, against The New York Central Railroad Company, Employer and Self-insurer, Appellant. Return to Writ of Error. Visscher, Whalen & Austin, Attorneys for Appellant, Office and Post-Office Address, 126 State Street, Albany, N. Y.

54 Supreme Court, Appellate Division, Third Department.

In the Matter of the Claim for Compensation, under the Workmen's Compensation Law, Made by MICHAEL BIANC, Employee, Respondent,

against

THE NEW YORK CENTRAL RAILROAD COMPANY, Employer and Self-insurer, Appellant.

STATE OF NEW YORK,
Third Judicial Department, ss:

I, Joseph H. Hollands, Clerk of the Appellate Division of the Supreme Court, in and for the Third Judicial Department of the State of New York, do hereby certify that there have been lodged with me, as such Clerk, this day, in the above entitled cause:

1. The original bond, of which a copy is hereto annexed;
2. Two copies of the writ of error as herein set forth, one for the defendant in error above and one to file in my office;
3. One copy of the prayer for reversal, petition and assignment of errors herein.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in the City of Albany, State of New York, this 19th day of May, 1919.

[Seal Supreme Court, Appellate Division, Third Department.]

JOSEPH H. HOLLANDS,
Clerk of the Appellate Division of the Supreme Court in and for the Third Judicial Department of the State of New York.

55 Supreme Court of the United States.

THE NEW YORK CENTRAL RAILROAD COMPANY, Plaintiff-in-error,

against

MICHAEL BIANC, Defendant-in-error.

Know all men by these presents, that The National Surety Company of New York, a corporation organized and existing under and by virtue of the Laws of the State of New York, and having its principal place of business at 115 Broadway, in the Borough of Manhattan, in the City of New York, is held and firmly bound unto Michael Bianc in the sum of Two thousand five hundred Dollars ($2,500.00), lawful money of the United States, to be paid to said Michael Bianc, his executors, administrators and assigns, for which payment, well and truly to be made, said The National Surety Com-

pany of New York binds itself, its successors and assigns, jointly and severally firmly by these presents.

Sealed with the seal of said The National Surety Company of New York and dated this 9th day of May, 1919.

Now, whereas the above named The New York Central Railroad Company is prosecuting a writ of error to the Supreme Court of the United States, to reverse the order of the Appellate Division of the Supreme Court, in and for the Third Judicial Department of the State of New York, entered on the 6th day of May, 1919, whereby a judgment of the Court of Appeals of the State of New York, rendered April 8th, 1919, was made the judgment of said Appellate Division, a reversal of which judgment is likewise sought

Now, therefore, the condition of this obligation is such that
56 if the above named The New York Central Railroad Company shall prosecute its said writ to effect and, if it fail to make its plea good, shall answer all damages and costs, then this obligation shall be void; otherwise to remain in full force and virtue.

[L. S.] NATIONAL SURETY COMPANY OF NEW YORK, N. Y.,
By JAMES L. NOONAN, [L. S.]
Attorney in Fact.

Approved this — day of May, 1919, to act as a supersedeas.
LOUIS D. BRANDEIS,
Associate Justice of the Supreme Court of the United States.

57 STATE OF NEW YORK,
City and County of Albany, ss:

On this 9th day of May, 1919, before me personally came James L. Noonan to me known, who, being by me duly sworn, did depose and say that he resided in the City of Albany; that he is the Attorney-in-Fact of the National Surety Company, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

[L. S.] JOHN J. RYAN,
Notary Public, Albany County, N. Y.

58 Know all men by these presents, that the National Surety Company, a corporation duly organized and existing under the laws of the State of New York, and having its principal offices in the City of New York, hath made, constituted and appointed, and does by these presents make, constitute and appoint James L. Noonan of Albany, State of New York, its true and lawful attorney, with full power and authority hereby conferred in its name, place and stead to sign, execute and acknowledge any and all bonds not exceeding $50,000 each in amount, guaranteeing the fidelity of persons holding places of public or private trust; guaranteeing the performance of contracts other than insurance policies; guaranteeing the

performance of insurance contracts where surety bonds are accepted by States or Municipalities in lieu of actual deposits; and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings or by law required, and to bind the National Surety Company thereby as fully and to the same extent as if such bonds were signed by the President, sealed with the common seal of the Company, and duly attested by its Secretary, hereby ratifying and confirming all the acts of said attorney pursuant to the power herein given. This power of attorney is made and executed pursuant to and by authority of the following by-law adopted by the Board of Directors of the National Surety Company at a meeting duly called and held on the Second day of February, 1909.

"Article XII. Resident Officers and Attorneys-in-Fact.

"Section 1. The President, First Vice-President or any other Vice-President may from time to time "appoint Resident Vice-Presidents, " Resident Assistant Secretaries and Attorneys-in-Fact to represent " and act for and on behalf of the Company, and either the President, " First Vice-President, or any other Vice-President, the Board of " Directors or the Executive Committee may at any time remove any " such Resident Vice-President, Resident Assistant Secretary or " Attorney-in-Fact and revoke the power and authority given him.

"Section 4. Attorneys-in-Fact. Attorneys-in-Fact may be given full power and authority to execute for "and in the name and on " behalf of the Company, any and all bonds, recognizances, contracts " of indemnity and other writings obligatory in the nature of a bond, " recognizance or conditional undertaking, and any such instrument " executed by any such Attorney-in-Fact shall be as binding upon the " Company as if signed by the President and sealed and attested by " the Secretary."

And, at a meeting of the Board of Directors of the National Surety Company, duly called and held on the Seventh day of March, A. D. 1912, a quorum being present, the following additional section to the foregoing By-Law was adopted:

"Section 6. Attorneys-in-Fact. Attorneys-in-Fact are hereby authorized to verify any affidavit required to "be attached to bonds, " recognizances or contracts of indemnity, policies of insurance and " all other writings obligatory in the nature thereof, and are also " authorized and empowered to certify to a copy of any By-Law " contained in Articles VI, XII and XIII of the By-Laws of the " Company."

In witness whereof, the National Surety Company has caused these presents to be isgned by its President and its corporate seal to be hereto affixed, duly attested by it Assistant Secretary, this eleventh day of November, A. D. 1916.

NATIONAL SURETY COMPANY,
By WM. B. JOYCE, *President.*

Attest:
M. CROOKE,
Assistant Secretary.

STATE OF NEW YORK,
County of New York, ss:

On this eleventh day of November, A. D. 1916, before me personally came Wm. B. Joyce, to me known, who, being by me duly sworn, did dispose and say that he resides in the City of New York; that he is the President of the National Surety Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

[Seal National Surety Company, New York, Incorporated 1897.]

WM. M. WEAVER,
Notary Public.

STATE OF NEW YORK,
County of New York, ss:

I, M. Crooke, Assistant Secretary of the National Surety Company, do hereby certify that the above and foregoing is a true and correct copy of a power of attorney, executed by said National Surety Company, which is still in full force and effect.

In witness whereof, I have hereunto set my hand and affixed the seal of said Company, at the City of New York, this 25th day of January, A. D. 1919.

M. CROOKE,
Assistant Secretary.

59 National Surety Company of New York.

Financial Statement, December 31st, 1918.

Wm. B. Joyce, President. Hubert J. Hewitt, Secretary.

Assets.

Cash in Bank and Offices	$811,293.00
Liberty Bonds	3,112,431.98
Other Government, Municipal and Industrial Bonds, and Stocks (Cost Price)	11,030,840.24
Real Estate, Mortgages and Collateral Loans	246,645.56
Unpaid Premiums	1,578,776.35
Accrued Interest and Accounts Receivable	536,770.41
Total	$17,316,757.54

Liabilities.

Unearned Premium Reserve	$3,536,076.72
Contingent Claim and Expense Reserve (Less Reinsurance)	1,863,969.98
Reserve for Premiums over 90 Days Past Due	314,281.77
Reserve for taxes and Unpaid Commissions (not due)	572,493.26
*Reserve for Depreciation from Cost of Securities	775,136.26
Accounts Payable and Expenses Incurred (not due)	1,126,933.04
Dividends Declared (Payable January 2nd, 1919)	120,000.00
Capital Stock	4,000,000.00
Surplus	5,007,866.51
Total	$17,316,757.54

STATE OF NEW YORK,
County of New York, ss:

M. Crooke, being duly sworn, says: That he is Assistant Secretary of the National Surety Company, that said Company is a Corporation duly organized, existing, and engaged in business as a Surety by virtue of the Laws of the State of New York, and has duly complied with all the requirements of the Laws of said State and of the Laws of the State of New York applicable to said Company, and is duly qualified to act as Surety under such Laws; that said Company has also complied with and is duly qualified to act as Surety under the Act of August 13, 1894, entitled, "An Act Relative to Recognizances, Stipulations, Bonds and Undertakings, and To Allow Certain Corporations To be Accepted As Surety Thereon," as amended by the Act of Congress of March 23, 1910. That the foregoing is a full true and correct statement of the financial condition of said Company on the 31st day of December, 1918.

[Seal National Surety Company, New York, Incorporated 1897.]

M. CROOKE,
Assistant Secretary.

Sworn to before me this 25th day of January, 1919.

[Seal Wm. M. Weaver, Notary Public, New York County.]

WM. M. WEAVER,
Notary Public for New York County, No. 23.

*NOTE.—Securities valued on basis determined by National Convention of Insurance Commissioners.

Certificate filed in Kings, No. 1 Nassau, Queens, No. 468.
Bronx No. 2, Richmond & Westchester Counties.
New York County Register's Office No. 10009.
Kings County Register's Office No. 101.
Bronx County Register's Office No. 203.
My commission expires March 30, 1920.

60 [Endorsed:] (Copy.) Supreme Court of the United States. The New York Central Railroad Company, Plaintiff-in-Error, against Michael Bianc, Defendant-in-Error. Supersedeas Bond. Robert E. Whalen, of Counsel for Plaintiff-in-error, Office and Post Office Address, 126 State Street, Albany, N. Y.

61 [Endorsed:] Original. Supreme Court, Appellate Division, Third Department. In the Matter of the Claim, &c., made by Michael Bianc, Employee, Respondent, against The New York Central Railroad Company, Employer and Self-Insurer, Appellant. Certificate of Lodgment. Visscher, Whalen & Austin, Attorneys for Appellant, Office and Post-Office Address, 126 State Street, Albany, N. Y.

62 Supreme Court of the United States.

THE NEW YORK CENTRAL RAILROAD COMPANY, Plaintiff-in-error,

against

MICHAEL BIANC, Defendant-in-error.

Prayer for Reversal.

To the Supreme Court of the United States:

Comes now The New York Central Railroad Company, plaintiff-in-error, and prays for a reversal of the order of the Supreme Court of the State of New York herein entered in the office of the Clerk of the Appellate Division thereof, in the Third Judicial Department of said State on the 6th day of May, 1919, affirming a decision and award of the State Industrial Commission of said State, a reversal of which is likewise prayed, entered on the 8th day of April, 1918; and plaintiff-in-error further prays for a reversal of a judgment of the Court of Appeals of state State, rendered on the 8th day of April, 1919, upon which said order hereinbefore first mentioned was entered.

And your petitioner will ever pray.
Dated, May 9th, 1919.

ROBERT E. WHALEN,
Of Counsel for the New York Central Railroad Company.

63 Supreme Court of the United States.

THE NEW YORK CENTRAL RAILROAD COMPANY, Plaintiff-in-error,

against

MICHAEL BIANC, Defendant-in-error.

Petition for Writ of Error.

To the Supreme Court of the United States and to the Honorable Justices thereof:

The petition of The New York Central Railroad Company, a corporation organized and incorporated by agreement of consolidation bearing date April 29th, 1914, and recorded in the office of the Secretary of State of the State of New York December 22nd, 1914, respectfully shows:

First. On or about the 17th day of November, 1917, the above named Michael Bianc commenced before the State Industrial Commission of the State of New York a special proceeding against your petitioner and therein alleged:

(*a.*) That said Michael Bianc, at about ten o'clock in the forenoon of December 18th, 1916, while employed as a machinist's helper by your petitioner in its roundhouse at West Albany, New York, was working under a locomotive which slipped back against a kerosene torch, with the result that his clothes were set afire.

(*b.*) That consequent burns to the head, limbs and body of said Michael Bianc disabled him from working for all but ten days of the period from the date of said accident to the 14th day of December, 1917, for which loss of earning power he claimed, in accordance

64 with the provisions of Chapter 41 of the Laws of 1914 of the State of New York, commonly known as the Workmen's Compensation Law, compensation, which said State Industrial Commission thereafter awarded to said Michael Bianc in the amount of Four hundred thirty-three Dollars and forty-four Cents ($433.44), which your petitioner has tendered.

(*c.*) That, by reason of such burns, said Michael Bianc had also sustained "serious facial and head disfigurement," for which he claimed a further allowance, which said State Industrial Commission made to him in the sum of Fifteen hundred Dollars ($1500.00), by virtue of the amendment, made by Chapter 622 of the Laws of 1916 of the State of New York, to Subdivision 3 of §15 of said Workmen's Compensation Law, whereby "in case of an injury resulting in serious facial or head disfigurement the commission may in its discretion, make such award or compensation as it may deem proper and equitable, in view of the nature of the disfigurement, but not to exceed three thousand five hundred dollars."

Second. In said proceeding before said commission your petitioner appeared and contended that to make to said Michael Bianc any award for facial or head disfigurement, under the provisions of said

amendment to Subdivision 3 of §15 of said Workmen's Compensation Law, would be tantamount to making an award not for loss of earning power, but for damages, and would, therefore, deprive your petitioner of its property without due process of law, in contravention of the provisions of the Fourteenth Amendment to the Constitution of the United States.

Third. The written decision and award which said State Industrial Commission, after hearing the allegations and proofs of the parties, entered on the 8th day of April, 1918, overruled the contention of your petitioner specified in paragraph Second of this
65 petition, but contained no finding that said facial and head disfigurement had in any wise impaired the earning capacity of said Michael Bianc, to whom said decision and award decreed that your petitioner pay for compensation said sum of $433.44, and for said facial and head disfigurement the said further sum of $1,500.00.

Fourth. From said decision and award of said State Industrial Commission your petitioner duly appealed to the Appellate Division of the Supreme Court, in and for the Third Judicial Department of the State of New York, where, upon the argument of said appeal which duly came on to be heard, your petitioner, through its counsel, duly urged against the validity of said award of $1,500.00 for said facial and head disfigurement the contention hereinbefore specified in paragraph Second of this petition, but said Appellate Division of the Supreme Court overruled said contention and, by an order bearing date November 12th, 1918, and entered in the office of the Clerk of said Appellate Division on the 19th day of November, 1918, said Appellate Division wholly affirmed said decision and award of said commission so entered on the 8th day of April, 1918.

Fifth. From said order of said Appellate Division your petitioner duly appealed to the Court of Appeals of the State of New York, which was and is the highest court of said state in which could be had a decision of the question so raised by said contention of your petitioner hereinbefore specified in paragraph Second of this petition, and which contention your petitioner, through its counsel, duly urged upon the argument of said appeal to the Court of Appeals of the State of New York which duly came on to be heard. But said Court of Appeals overruled said contention of your petitioner and,
66 by its judgment rendered April 8th, 1919, said Court of Appeals affirmed said order of said Appellate Division of the Supreme Court, to which said Court of Appeals sent down its remittitur, consisting of a copy of the said judgment of said Court of Appeals and of the papers upon which said Court of Appeals made its said judgment, and said remittitur was filed on the 9th day of April, 1919, in the office of the Clerk of said Appellate Division where said remittitur now remains of record. Upon said remittitur a final order, reexamination and reversal of which by this court your petitioner seeks, was entered on the 6th day of May, 1919, in the office of the Clerk of said Appellate Division, whereby the said judgment of the Court of Appeals herein became the order of said Appellate Division, and the sum of Ninety-nine Dollars and fifty Cents

($99.50), costs of said appeal to said Court of Appeals, was awarded against your petitioner.

Sixth. In said judgment of the Court of Appeals, as well as in said final order thereon so entered on the 6th day of May, 1919, in the office of the Clerk of said Appellate Division, there was drawn in question the validity of a statute of the State of New York, to wit, said amendment made by said Chapter 622 of the Laws of 1916 to Subdivision 3 of §15 of said Workmen's Compensation Law, upon the ground of the repugnancy of said statute to the due process clause of the Fourteenth Amendment to the Constitution of the United States, but the decision was in favor of the validity of such statute.

Seventh. By virtue of the provisions of said Workmen's Compensation Law said State Industrial Commission, which is now composed of John Mitchell, Edward P. Lyon, James M. Lynch,
67 Henry D. Sayer and Frances E. Perkins, appeared by the Attorney General of the State of New York both in said Appellate Division and in said Court of Appeals, in support of the validity of said statute thus brought up for review by said appeals.

Wherefore, your petitioner prays that a writ of error may be allowed and issued directed to the Appellate Division of the Supreme Court, in and for the Third Judicial Department of the State of New York, commanding said Appellate Division to send to the Supreme Court of the United States the record of all and singular the record and papers in said special proceeding and for citation and supersedeas to stay execution, to the end that the errors of which your petitioner complains herein and in the assignment of errors herein filed may be reviewed and, if errors be found, corrected conformably to the Constitution and Laws of the United States.

And your petitioner will ever pray.

Dated, May 9th, 1919.

THE NEW YORK CENTRAL RAILROAD COMPANY,
By ROBERT E. WHALEN, *Counsel.*

68 STATE OF NEW YORK,
City and County of Albany, ss:

Robert E. Whalen, being duly sworn, deposes and says that he is the regularly retained counsel for the petitioner, The New York Central Railroad Company, in this proceeding. That he has read the foregoing petition, the contents whereof he knows to be true. That the reason why this verification is made by deponent is that said petitioner is a corporation, none of whose officers resides or is within the County of Albany, State of New York, where deponent resides and has his place of business. ROBERT E. WHALEN.

Subscribed and sworn to before me this 9th day of May, 1919.

[Seal Edith L. Jones, Albany County, N. Y.]

EDITH L. JONES,
Notary Public, Albany County, N. Y.

69 Supreme Court of the United States.

THE NEW YORK CENTRAL RAILROAD COMPANY, Plaintiff-in-error,

against

MICHAEL BIANC, Defendant-in-error.

Assignment of Errors.

Comes now The New York Central Railroad Company, plaintiff-in-error, and makes and files this its assignment of errors:

The Appellate Division of the Supreme Court, in and for the Third Judicial Department of the State of New York, in its order entered May 6th, 1919, whereby the judgment of the Court of Appeals of the State of New York, rendered April 8th, 1919, was made the judgment of said Appellate Division, erred, as did also said Court of Appeals and the State Industrial Commission of the State of New York, in overruling the contention of your petitioner that to make to said Michael Bianc an award in this proceeding for facial and head disfigurement, under the amendment made by Chapter 622 of the Laws of 1916 of the State of New York to Subdivision 3 of §15 of the Workmen's Compensation Law of said state, would deprive your petitioner of its property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States.

Dated, May 9th, 1919.

ROBERT E. WHALEN,
Of Counsel for the New York Central Railroad Company.

70 [Endorsed:] (Original.) Supreme Court of the United States. The New York Central Railroad Company, Plaintiff-in-Error, against Michael Bianc, Defendant-in-Error. Prayer for Reversal, Petition for Writ of Error, and Assignment of Errors. Robert E. Whalen, of Counsel for Plaintiff-in-Error, Office and Post Office Address, 126 State Street, Albany, N. Y.

71 UNITED STATES OF AMERICA, *ss*:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court, Appellate Division, in and for the Third Judicial Department of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court, Appellate Division, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Michael Bianc and The New York Central Rail-

road Company, wherein was drawn in question the validity of a treaty or statute of, or an authority e ercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repug-
72 nant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity; a manifest error hath happened to the great damage of the said The New York Central Railroad Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the fourteenth day of May, in the year of our Lord one thousand nine hundred and nineteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

Allowed by
LOUIS D. BRANDEIS,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Supreme Court of the United States, October Term, 1918. The New York Central Railroad Company, Plff. in Error, vs. Michael Bianc. Writ of Error.

73 UNITED STATES OF AMERICA, *ss:*

To Michael Bianc, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court, Appellate Division, in and for the Third Judicial Department of the State of New York, wherein The New York Central Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Louis D. Brandeis, Associate Justice of the Supreme Court of the United States, this fourteenth day of May, in the year of our Lord one thousand nine hundred and nineteen.

LOUIS D. BRANDEIS,
Associate Justice of the Supreme Court of the United States.

Due and personal service of a copy of the within Citation is hereby admitted this 16th day of May, 1919.

CHARLES D. NEWTON,
(E. C. A.),
Attorney General of the State of New York.

Endorsed on cover: File No. 27,125. New York Supreme Court, Appellate Division, 3d Judicial Department. Term No. 1039. The New York Central Railroad Company, plaintiff in error, vs. Michael Bianc. Filed May 21st, 1919. File No. 27,125.

Office Supreme Court, U. S.
FILED
MAY 28 1919
JAMES D. MAHER,
CLERK.

SUPREME COURT OF THE UNITED STATES.

NEW YORK CENTRAL RAILROAD COMPANY
Plaintiff-in-Error

against

MICHAEL BIANC No. [redacted] 374
Defendant-in-Error

AMERICAN KNIFE COMPANY
and
AETNA LIFE INSURANCE COMPANY
Plaintiffs-in-Error

against

GEORGE SWEETING No. [redacted] 37[redacted]
Defendant-in-Error

CLARK KNITTING COMPANY
and
AETNA LIFE INSURANCE COMPANY 376
Plaintiffs-in-Error

against

ELIZABETH VAUGHN No. [redacted]
Defendant-in-Error

MOTION TO ADVANCE

CHARLES D. NEWTON
Attorney General

E. C. AIKEN
Deputy Attorney General
of Counsel for the State Industrial Commission

IN THE

SUPREME COURT OF THE UNITED STATES

NEW YORK CENTRAL RAILROAD COMPANY,
Plaintiff-in-Error,

against

MICHAEL BIANC,
Defendant-in-Error.

AMERICAN KNIFE COMPANY and AETNA LIFE INSURANCE COMPANY,
Plaintiffs-in-Error,

against

GEORGE SWEETING,
Defendant-in-Error.

CLARK KNITTING COMPANY and AETNA LIFE INSURANCE COMPANY,
Plaintiffs-in-Error,

against

ELIZABETH VAUGHN,
Defendant-in-Error.

SIRS.— Please take notice that a motion will be made at a session of this court appointed to be held on the second day of June, 1919, at 12 o'clock noon, or as soon thereafter as counsel can be heard, to advance the hearing and argument of the appeals in the above causes, and for such other relief as may be proper.

Dated, Albany, N. Y., May 23, 1919.

CHARLES D. NEWTON,
Attorney-General,
Attorney for the State Industrial Commission,
Capitol, Albany, N. Y.

E. C. AIKEN,
Deputy Attorney-General,
of Counsel.

To:

VISSCHER, WHALEN & AUSTIN, Esqs.,
Attorneys for Plaintiff-in-Error, Ny C. R.R. Co
~~Michael Biane~~,
Office and Postoffice address,
Albany, N. Y.

WILLIAM H. FOSTER, Esq.,
Attorney for American Knife Co. and Aetna Life Insurance Co. and Clark Knitting Co. and Aetna Life Insurance Co.
Office and Postoffice address,
Syracuse, N. Y.

NEW YORK CENTRAL RAILROAD COMPANY,
Plaintiff-in-Error,

against

MICHAEL BIANC,
Defendant-in-Error.

AMERICAN KNIFE COMPANY and AETNA LIFE INSURANCE COMPANY,
Plaintiffs-in-Error,

against

GEORGE SWEETING,
Defendant-in-Error.

CLARK KNITTING COMPANY and AETNA LIFE INSURANCE COMPANY,
Plaintiffs-in-Error,

against

ELIZABETH VAUGHN,
Defendant-in-Error.

Now comes the State Industrial Commission, representing the defendants-in-error, and moves this court to advance these causes on the docket of this court.

STATEMENT AND REASONS FOR ADVANCEMENT.

These causes are now pending in this court on writs of error allowed by Mr. Justice Brandeis.

Said State Industrial Commission is charged under the statutes of the State of New York with the administration of the Workmen's Compensation Law in said State, and by the said law is made a party to all proceedings upon appeal in matters decided by it.

That in the above-entitled matters, in each case, an award was made for facial disfigurement; in the case of Michael Bianc of $1,500.00, in the case of George Sweeting of $2,500.00, and in the case of Elizabeth Vaughn of $3,500.00; that said awards were made under an amendment to the Workmen's Compensation added by chapter 622 of the Laws of 1916 of the State of New York, which provides as follows:

> "In case of an injury resulting in serious facial or head disfigurement the commission may in its discretion, make such award or compensation as it may deem proper and equitable, in view of the nature of the disfigurement, but not to exceed three thousand five hundred dollars."

That the plaintiffs-in-error in the above matters have challenged the said awards on the ground that the amendment to the Workmen's Compensation Law is unconstitutional; that said matters were duly argued upon appeal at the Appellate Division of the Supreme Court of the State of New York and also the Court of Appeals, in both of which courts said awards were affirmed and the said plaintiffs-in-error have sued out a writ

of error to review said decisions, which writ of error is dated the 14th day of May, 1919.

That in addition to these three cases there are at present pending three other cases involving the same question, pending on appeal besides other cases awaiting decision, which cannot be decided until a hearing and decision by this court of these three cases brought up by writ of error; that in addition to the cases now pending there will undoubtedly be other cases which may arise prior to the determination herein and it is very important for this reason that the law should be settled by this court at an early date so that there may be a due administration of the Workmen's Compensation Law in the State of New York; that most of the claimants for compensation are men or women depending upon their wages and with very limited means, and it is, therefore, very desirable to have an early decision. The decision of this court will also affect states other than the State of New York which have laws allowing damages for facial disfigurement.

CHARLES D. NEWTON,
Attorney-General.

E. C. AIKEN,
of Counsel,
for the State Industrial Commission.

NEW YORK CENTRAL RAILROAD COMPANY,
Plaintiff-in-Error.

against

MICHAEL BIANC,
Defendant-in-Error.

AMERICAN KNIFE COMPANY and AETNA LIFE INSURANCE COMPANY,
Plaintiffs-in-Error,

against

GEORGE SWEETING,
Defendant-in-Error.

CLARK KNITTING COMPANY and AETNA LIFE INSURANCE COMPANY,
Plaintiffs-in-Error,

against

ELIZABETH VAUGHN,
Defendant-in-Error.

Now comes the New York Central Railroad Company, represented by Visscher, Whalen & Austin, and American Knife Company and Aetna Life Insurance Company, Clark Knitting Com-

pany and Aetna Life Insurance Company, represented by William H. Foster, and all represented by Robert E. Whalen, as counsel, and on motion to advance these causes concurs with the counsel for the State Industrial Commission.

VISSCHER, WHALEN & AUSTIN,
Attorneys for the New York Central Railroad Co., Plaintiff-in-Error.

WILLIAM H. FOSTER,
Attorney for American Knife Company and Aetna Life Insurance Company, Clark Knitting Company and Aetna Life Insurance Company.

ROBERT E. WHALEN,
Of counsel for all of the Plaintiffs-in-Error.

BRIEF OF PLAINTIFF-IN-ERROR.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

No. 374.

THE NEW YORK CENTRAL RAILROAD COMPANY,
Plaintiff-in-error.

against

MICHAEL BIANC.

In error to the Supreme Court, Appellate Division, Third Judicial Department, of the State of New York.

Statement of the Case.

This case involves (Transcript, p. 38) the constitutionality, under the due process clause of the Fourteenth Amendment to the Constitution of the United States, of the so-called "beauty-clause" which, added by chapter 622 of the Laws of 1916 of the State of New York to subdivision 3 of § 15 of the New York Workmen's Compensation Law, provides that "in case of an injury resulting in serious facial or head disfigurement the commission may in its discretion, make such award or compensation as it may deem proper and equitable, in view of the nature of the disfigurement, but not to exceed three thousand five hundred dollars."

So much of the New York Workmen's Compensation Law, thus amended, as is deemed necessary to the decision of this cause, is annexed to this brief as Appendix "A" thereof (p. 17, *infra*).

Section 19, added to Article I of the Constitution of the State of New York in 1913, effective January 1, 1914, is annexed to this brief as Appendix "B" thereof (p. 33, *infra*). It is also printed in full in 243 U. S., at pp. 195-196.

This proceeding was commenced by claimant, defendant-in-error, before the State Industrial Commission of the State of New York, a Commission established by the Workmen's Compensation Law, by presentation of a claim to recover "compensation for disability" (Transcript, p. 2), alleged to have resulted from burns of the head, limbs and body while he was employed in a roundhouse of plaintiff-in-error.

There were no pleadings before the Commission which made to claimant on December 19, 1917, an award of "$433.44 for 48 weeks' disability at $9.03 per week." (Transcript, pp. 5, 8, 16.) On January 9, 1918, however, the Commission rescinded that award, because of the desire of claimant to commence against plaintiff-in-error an action under the Federal Employers' Liability Act. (Transcript, p. 6.)

Claimant thereafter changed his mind again and decided not to commence an action under the Federal Employers' Liability Act, but to look to the Industrial Commission for an allowance for disfigurement under the so-called "beauty clause." (Transcript, pp. 9, 11.) Accordingly, on April 8, 1918, the Commission reopened the case and held a further hearing at which the employer, in addition to objections on non-Federal grounds, interposed the following objection to the rendition of any award to claimant for facial or head disfigurement (Transcript, p. 15):

> "That to make to the claimant herein any award for facial or head disfigurement, under the provisions of § 15 of the Workmen's Compensation Law, will be tantamount to making

> an award not for loss of earning power, but for damages, and will, therefore, deprive said employer of its property without due process of law, in contravention of the provisions of the Fourteenth Amendment to the Federal Constitution."

The Commission, however, overruled the objection and on the same day made its "decision and award" (Transcript, p. 17), as the statute designates the determination of the Commission whereby, in addition to a reinstatement of the earlier award of compensation for forty-eight weeks, it was also provided (Transcript, p. 18):

> "Award of compensation is further made against New York Central Railroad Co., Employer and Self-insurer, to Michael Bianc in the sum of $1,500 account of and in view of the serious facial and head disfigurement resulting from the injuries sustained on December 18, 1916."

The Appellate Division of the Supreme Court, in the Third Judicial Department, unanimously and without opinion, affirmed the decision and award of the Commission. (Transcript, pp. 20-21, 23.) On further appeal taken to the Court of Appeals, the Appellate Division's order of affirmance was in turn affirmed (226 N. Y., 585), on the authority of *Matter of Sweeting v. American Knife Co.* (226 N. Y., 199), decided on the same day. (Transcript, p. 24.) The opinions in the Court of Appeals are also printed at pp. 30-33 of the Transcript of Record in the *Sweeting* case, which is No. 375 upon the docket of the present term of this court.

The Court of Appeals sent down its remittitur to the Appellate Division, to which the writ of error from this court is directed. (Transcript, pp. 25, 30.)

Specification of Error.

Plaintiff-in-error contends that the Court of Appeals, as also the Appellate Division and the State Industrial Commission, erred in not holding that to make to defendant-in-error an award for facial or head disfigurement, under the provisions of section 15 of the Workmen's Compensation Law, would deprive plaintiff-in-error of its property without due process of law, in contravention of the provisions of the Fourteenth Amendment to the Federal Constitution.

Argument.

Statement of Facts.

On December 18, 1916, at ten o'clock in the forenoon, claimant, employed by the railroad as a machinist's helper in its roundhouse at the West Albany Shops, was working under a locomotive which slipped back against a kerosene torch, with the result that claimant's clothes were set afire. (Transcript, pp. 2, 17.) Consequent burns to claimant's head, limbs and body disabled him from working for all but ten days of the period from the date of the accident to December 14, 1917, and it is for the earning power thus lost that the award of $433.44 has been made and tendered. (Transcript, pp. 7, 17, 18, 35.)

By reason of such burns, claimant also sustained "serious facial and head disfigurement," for which the Commission has awarded him $1,500. (Transcript, pp. 7, 17, 18.)

"The nature of said disfigurement consists of an extensive scar over the entire occipital region of the head, with loss of hair in consequence of the destruction of all hair follicles, and as a result of serious burns to both ears there is a marked external visible defect of each ear, due to the defective scars following the destruction of the tissues of

the ear shell, and both ears are badly shrivelled." (Transcript, p. 18.)

The record is devoid of finding, testimony or even allegation that claimant's disfigurement has diminished his earning power for a longer period than that for which the statutory compensation of $433.44 has been made, or that it has rendered him any less eligible for employment. No fault on the part of employer, as a cause of claimant's mishap, is charged, established or found.

POINT I.

The additional award of $1,500.00 for disfigurement deprives the employer, without fault, of its property without due process of law.

1. *Such additional award is wholly unrelated to claimant's ability to work.*

There is not the slightest intimation in the attending physician's report (Transcript, pp. 3-4), or in the report of the medical examiner (Transcript, pp. 4-5), or in the report of the medical bureau (Transcript, pp. 14-15), or in the findings (Transcript, pp. 17-18) that the disfigurement has impaired claimant's earning capacity beyond the period of forty-eight weeks for which he was awarded $433.44, which was made for the entire period of claimant's disability (Transcript, pp. 5, 7, 16, 18). Moreover, when that award of $433.44 was made, plaintiff had returned to work (Transcript, pp. 10, 11-12).

Before the Commission the employer distinctly objected to the rendition of any award for disfigurement that had no relation to the claimant's earning capacity (Transcript, pp. 9, 11, 12).

2. *Only impairment of earning power justifies compulsory payment of workmen's compensation for disabling or fatal injuries inflicted without fault.*

The following excerpts from the opinion of this court in *New York Central R. R. Co. v. White* (243 U. S., 188) emphasize the stress placed upon the *compensatory* feature of the New York Workmen's Compensation Law as sustaining the validity of that statute, enacted in exercise of the police power, against the contention that it violated the due process clause of the Fourteenth Amendment (italics ours):

> "Compensation under the act is not regulated by the measure of damages applied in negligence suits, but in addition to providing medical, surgical, or other like treatment, *it is based solely on loss of earning power*, being graduated according to the average weekly wages of the injured employee and the character and duration of the disability, whether partial or total, temporary or permanent." (P. 193.)
>
> "Under the present system the injured workman is left to bear the greater part of industrial accident loss, which because of his limited income he is unable to sustain, so that *he and those dependent upon him are overcome by poverty and frequently become a burden upon public or private charity.*" (P. 197.)
>
> "The physical suffering must be borne by the employee alone; the laws of nature prevent this from being evaded or shifted to another, and the statute makes no attempt to afford an equivalent in compensation. But, besides, *there is the loss of earning power*, a loss of that which stands to the employee as his capital in trade. This is a loss arising out of the business, and, however, it may be charged up, is an expense of the operation, as truly as the cost of repairing broken machinery or any other expense that ordinarily is paid by the employer. Who is to bear the charge? It is plain that, on grounds of natural justice, it is not unreasou-

able for the State, while relieving the employer from responsibility for damages measured by common-law standards and payable in cases where he or those for whose conduct he is answerable are found to be at fault, to require him to contribute a reasonable amount, and according to a reasonable and definite scale, by way of compensation for the *loss of earning power* incurred in the common enterprise, irrespective of the question of negligence, *instead of leaving the entire loss to rest* where it may chance to fall — that is, *upon the injured employee or his dependents.*" (Pp. 203-204.)

"*The pecuniary loss* resulting from the employee's death or disablement must fall somewhere." (P. 205.)

"The subject-matter in respect of which freedom of contract is restricted is the matter of *compensation for human life or limb lost or disability incurred* in the course of hazardous employment, and the public has a direct interest in this as affecting the common welfare." (P. 206.)

In *Mountain Timber Co. v. Washington* (243 U. S., 219), similar emphasis was placed by this court upon the *compensatory* design of the Washington Compensation Law, likewise sustained as not violative of the due process guaranty (Italics ours):

"Sure and certain *relief for workmen,* injured in extra hazardous work, *and their families and dependents* is hereby provided." (P. 228, quoting from the first section of the Washington Act.)

"The States are not prevented by the Fourteenth Amendment, while relieving employers from liability for damages measured by common-law standards and payable in cases where they or others for whose conduct they are answerable are found to be at fault, from requiring them to contribute reasonable amounts and according to a reasonable and definite scale by way of *compensation for the loss of earning power* arising from accidental injuries to their employees, irrespective of the question

of negligence, instead of leaving the entire loss to rest where it may chance to fall, that is, upon particular injured employees and *their dependents*." (P. 236.)

"Certainly the operation of industrial establishments that in the ordinary course of things frequently and inevitably produce *disabling or mortal injuries* to the human beings employed is not a matter of wholly private concern." (P. 239.)

"We are clearly of the opinion that a State, in the exercise of its power to pass such legislation as reasonably is deemed to be necessary to promote the health, safety, and general welfare of its people, may regulate the carrying on of industrial occupations that frequently and inevitably produce *personal injuries and disability with consequent loss of earning power* among the men and women employed, *and occasionally, loss of life of those who have wives and children or other relations dependent upon them for support*, and may require that these human losses shall be charged against the industry." (P. 243.)

This court has pointed out that "compensation for disabling and fatal injuries irrespective of the question of fault" was involved in the decisions of the cases which sustained the New York and the Washington Acts.

Middleton v. Texas Power and Light Co., 249 U. S., 152, 163.

Mr. Justice PITNEY, writing for the majority of this court in *Arizona Copper Co., Ltd. v. Hammer*, decided June 9th, 1919, and not yet officially reported, at the middle of p. 8 of the pamphlet form of the opinion used for certification by the clerk, affirmed the power of the people of Arizona, through constitutional and legislative provisions, to erect safeguards against "leaving the injured ones, and the dependents of those whose lives are lost through accidents due to the conditions of the occupation,

to be a *burden upon the public.*" (Italics ours.) And at p. 10 of the same pamphlet he adverted to the sovereign power thus to regulate the conduct of those hazardous industries in which "human beings * * * in the pursuit of a livelihood must expose themselves to death or to physical injuries more or less disabling, with consequent impoverishment, partial or total, of the workman or those dependent upon him."

In *Ball v. Wm. Hunt & Sons, Ltd.* (1912) A. C. 496, cited at the bottom of page two of the clerk's pamphlet copy of Mr. Justice HOLMES' concurring opinion in the *Arizona Copper* case, and also cited by Judge POUND of the New York Court of Appeals in his concurring opinion in the case of *Sweeting* (Transcript of Record in No. 375, at p. 33), Lord SHAW of Dunfermline declared that "the theory and datum upon which such compensation proceeds is that of compensation for injury to the worker as a wage-earner, and it is the incapacity to earn a wage which forms the standard upon which the compensation is reckoned." (P. 507.)

Reparation for diminution or destruction of earning power being, then, the basis of constitutional sanction for compulsory payment of compensation, in the absence of fault on an employer's part, the award for disfigurement, under review herein, cannot stand.

At the top of each of pp. 9, 10 and 11 of the clerk's pamphlet copy of the opinion of Mr. Justice PITNEY in *Arizona Copper Co. Ltd. v. Hammer,* a feature of the Arizona Act which was considered to be an element of guaranty of due process was the provision therein for trial of issues of fact and assessment of damages before a constitutional jury, in a judicial tribunal, in accordance with long established modes and ordinary processes of law — "substantially the common law method." In the case at bar no such safeguard was vouchsafed to

the employer in the rendition of the award to the claimant for disfigurement. It is instructive to glean from the record the obvious design of the claimant to utilize the Industrial Commission as a jury. After obtaining the initial award of compensation for disability, which he persuaded the Commission to rescind so that he might sue under the Federal Employers' Liability Act, claimant once more recanted and appeared before the Commission in quest not only of compensation but also of damages. (Transcript, pp. 9, 10-11.) Due process of law, however, contemplates that damages, as distinguished from compensation for loss or diminution of earning power during hazardous employment, shall be fixed and awarded, if at all, by a jury and not by a board. That is to say, damages are to be assessed by a jury, rather than by a number of commissioners, be they one, two, three, four or five, who may chance to drift into or out of a hearing. Damages, when awarded, must represent the deliberate judgment of a tribunal vested with and exercising judicial functions, not the determination of a body which is clothed with statutory power to proceed as summarily as a court marshal. (§§ 20, 68, pp. 26 and 32, *infra*).

Quite recently the Federal Circuit Court of Appeals for the Second Circuit has drawn the following distinction between "compensation" under the Workmen's Compensation Law and "damages" under the Federal Employers' Liability Act:

> "It is the essential nature of any compensation act that it does not depend upon or is not invoked as the result of an act of negligence. What is assured to the workman thereby is not compensatory damages for a tort, but a species of insurance against hurts received in the line of occupation without (perhaps) anybody's fault. But § 1 of the Liability Act (35 Stat., 65) declares that common carriers shall be liable 'in damages' for the injuries due to

> their 'negligence.' These words refer to a course and habit of litigation only too well known for some generations and must be interpreted accordingly. Damages mean what juries assess according to their own views of value, and the act authorizing such damages supersedes all state laws relating to the same subject."
>
> Erie R. Co. v. Linnekogel, 248 Fed., 389, 392.

3. *The disfigurement clause is not a reasonable exercise of the police power.*

In upholding the New York Act as originally enacted, this court in *New York Central R. R. Co. v. White* (243 U. S., 188) said:

> "We recognize that the legislation under review does measurably limit the freedom of employer and employee to agree respecting the terms of employment, and that it cannot be supported except on the ground that it is a reasonable exercise of the police power of the State. In our opinion it is fairly supportable upon that ground. And for this reason: The subject-matter in respect of which freedom of contract is restricted is the matter of compensation for human life or limb lost or disability incurred in the course of hazardous employment, and the public has a direct interest in this as affecting the common welfare. * * * This statute does not concern itself with measures of prevention, which presumably are embraced in other laws. But the interest of the public is not confined to these. One of the grounds of its concern with the continued life and earning power of the individual is its interest in the prevention of pauperism, with its concomitants of vice and crime. And, in our opinion, laws regulating the responsibility of employers for the injury or death of employees arising out of the employment bear so close a relation to the protection of the lives and safety of those concerned that they properly may be regarded as coming within the category of police regulations." (Pp. 206, 207.)

So, too, the Washington Act was sustained as a valid exercise of the authority of that State to enact such legislation as reasonably may be deemed to be necessary to promote the health, safety and general welfare of its people.

Mountain Timber Co. v. Washington,
243 U. S., 219, 238, 243.

The opinion of Mr. Justice PITNEY in *Arizona Copper Co. Ltd. v. Hammer,* at pp. 3-4 and at p. 5 of the clerk's pamphlet copy thereof, is addressed to consideration of the question whether the Arizona Act could be classified as legislation enacted in the public interest and reasonably designed to promote the general welfare.

Now, if, as recognized at p. 207 of the opinion of this court in *New York Central R. R. Co. v. White,* the New York Act is not, nor is it asserted to be, a measure in furtherance of health or safety, it remains simply to inquire whether the disfigurement clause under review has any reasonable relation to the general welfare. The question, it is submitted, carries its own answer, since, once adequate provision has been made for loss or diminution of earning capacity, it is of no public concern whether the claimant shall or shall not receive a further award for impairment of good looks not in any wise related to earning power.

4. *Hence, the clause in question is arbitrary and oppressive.*

Repeatedly it has been stated in cognate terms that the subject of judicial inquiry, in such a case as this, is whether the statute under consideration "is arbitrary and unreasonable, from the standpoint of natural justice" (*White* case, at p. 202); or "so extravagant or arbitrary as to constitute an abuse of power" (*Mountain Timber* case, at

p. 237.) Such was the test applied in determining the validity of the Arizona Act (clerk's pamphlet copy of Mr. Justice PITNEY's opinion, pp. 4, 5, 8, 9, 11).

There being no claim that any element of public health or of public safety is involved, and no real consideration of public welfare being presented, it follows that the clause in question, purporting to impose liability for disfigurement inflicted without fault is fairly to be characterized as unreasonable and fundamentally unjust.

POINT II.

The question here presented is an open one.

1. *It was not decided in the White or Mountain Timber cases.*

In sustaining the New York Act as originally enacted Mr. Justice PITNEY said:

> "It is important to be observed that the Act applies only to disabling or fatal personal injuries received in the course of hazardous employment in gainful occupation." (Pp. 202-203.)

In the *Mountain Timber* case "the matter of compensation for accidental injuries with resulting loss of life or earning capacity of men employed in hazardous occupations" (p. 239) was the subject of the act then before the court.

2. *It was not decided in the Arizona Copper cases.*

At the end of the first paragraph of the concurring opinion of Mr. Justice HOLMES, and again towards the bottom of p. 2 of the clerk's pamphlet

copy of that opinion, disfigurement is mentioned as an element of damage for which a recovery may be allowed under the Arizona Act, and in that connection passing reference is made to *Arizona Copper Co. v. Burciaga* (177 Pac. Rep., 29, 33). In that case, however, it does not appear that disfigurement had been suffered by the workman; nor does the opinion of the Supreme Court of Arizona discuss disfigurement as an element of damage.

Of the five cases, involving the Arizona Act, upon which this court passed on June 9, 1919, the *Mendez* case appears from the statement of facts in 19 Ariz., 151, to have involved injury to sight; the *Tomich* case appears from the statement of facts in 19 Ariz., 182, to have dealt with the loss of three fingers; and the *Veazey* case is not stated in the analysis thereof in the dissenting opinion of Mr. Justice McReynolds to have been a case of disfigurement. So far as counsel herein have been able to ascertain, the nature of the injuries in the cases of *Hammer* and of *Bray* has not been stated in any reported opinion.

3. *Neither the Ball case nor the Erickson case decided the question.*

In *Ball v. Wm. Hunt & Sons, Ltd.* (1912), A. C., 496, cited in the concurring opinion of Mr. Justice Holmes in the *Arizona Copper* cases, and also cited in the concurring opinion of Judge Pound of the New York Court of Appeals in the case of *American Knife Co. v. Sweeting*, argued herewith, the statement of facts discloses that those to whom claimant applied for work "refused to employ him on account of the fact that he had only one eye." (P. 497.) The opinion of Earl Loreburn states that claimant remained just as able to work after his injury, but because of his partial blindness could get

no work. (P. 499.) Lord ATKINSON declared that, though claimant's physical ability to work was the same, his recent accident had destroyed the market for his labour. (P. 501.) Later in his opinion he said:

> "On examining the schedule, one plainly sees that what is to be compensated for is not, as in ordinary actions of tort, the pain and suffering which the plaintiff has endured, or the disfigurement of, or injury to, his body which has been inflicted upon him, but the loss of the power to earn wages which has resulted from the injury. * * * If because of his apparent physical defects no one will employ him, however efficient he may be in fact, he has lost the power to earn wages as completely as if he was paralyzed in every limb." (Pp. 504, 505.)

Lord SHAW of Dunfermline said:

> "With regard to his power to do work, it remains as before; but with regard to his power to get work, that appears to have been lost, or at least diminished, and, up to the time of the trial, notwithstanding frequent applications in various quarters, he has been refused employment on account of the disfigurement above referred to." (P. 506.)

In *Matter of Erickson v. Preuss* (223 N. Y., 365), cited in the concurring opinion of Judge POUND of the New York Court of Appeals in the *Sweeting* case (Transcript in Sweeting case, p. 32-33), and cited also in the concurring opinion of Mr. Justice HOLMES in the *Arizona Copper* cases, no constitutional objection, on State or Federal grounds, was urged against the validity of the disfigurement clause. Rather, there was presented simply a question of statutory construction, namely, whether an award for disfigurement was within the contempla-

tion of the New York Legislature, where no diminution of earning capacity was involved.

POINT III.

So much of the judgment under review as sustains the additional award of $1,500.00 to claimant for disfigurement should be reversed, and this cause should be remanded for further proceedings not inconsistent with the decision of this court.

All of which is respectfully submitted.

Dated, October 13, 1919.

FRANK V. WHITING,
ROBERT E. WHALEN,
Of Counsel for Plaintiff-in-Error.

APPENDIX "A."

THE WORKMEN'S COMPENSATION LAW.

Chapter 816 of the Laws of 1913, as amended and re-enacted by chapter 41 of the Laws of 1914, constituting chapter 67 of the Consolidated Laws, as amended.

ARTICLE 1.

SHORT TITLE; APPLICATION; DEFINITIONS.

Section 1. Short title.—This chapter shall be known as the "workmen's compensation law."

§ 2. Application.— Compensation provided for in this chapter shall be payable for injuries sustained or death incurred by employees engaged in the following hazardous employments:

Group 1. The operation, including construction and repair, of railways operated by steam, electric or other motive power, street railways, and incline railways, but not their construction when constructed by any person other than the company which owns or operates the railway, including work of express, sleeping, parlor and dining car employees on railway trains.

Group 2. Construction, repair and operation of railways not including group 1.

Group 3. The operation, including construction and repair, of car shops, machine shops, steam and power plants, and other works for the purpose of any such railway, or used or to be used in connection with it when operated, constructed or repaired by the company which owns or operates the railway.

* * * * * * * * * * *

§ 3. Definitions.—As used in this chapter. * * *

6. "Compensation" means the money allowance payable to an employee or to his dependents as provided for in this chapter, and includes funeral benefits provided therein * * *

9. "Wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident, including the reasonable value of board, rent, housing, lodging or similar advantage received from the employer. * * *

12. "Insurance carrier" shall include the state fund, stock corporations or mutual associations with which employers have insured, and employers permitted to pay compensation directly under the provisions of subdivision three of section fifty. * * *

ARTICLE 2.

COMPENSATION.

* * * *

§ 10. Liability for compensation.—Every employer subject to the provisions of this chapter shall pay or provide as required by this chapter compensation according to the schedules of this article for the disability or death of his employee resulting from an accidental personal injury sustained by the employee arising out of and in the course of his employment, without regard to fault as a cause of such injury, except where the injury is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty. Where the injury is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty, neither the injured employee nor any dependent

of such employee shall receive compensation under this chapter.

§ 11. Alternative remedy.—The liability of an employer prescribed by the last preceding section shall be exclusive and in place of any other liability whatsoever, to such employee, his personal representatives, husband, parents, dependents or next of kin, or anyone otherwise entitled to recover damages, at common law or otherwise on account of such injury or death, except that if an employer fail to secure the payment of compensation for his injured employees and their dependents as provided in section fifty of this chapter, an injured employee, or his legal representative in case death results from the injury, may, at his option, elect to claim compensation under this chapter, or to maintain an action in the courts for damages on account of such injury; and in such an action it shall not be necessary to plead or prove freedom from contributory negligence nor may the defendant plead as a defense that the injury was caused by the negligence of a fellow servant nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee.

* * * * * * * * * *

§ 14. Weekly wages basis of compensation.—Except as otherwise provided in this chapter, the average weekly wages of the injured employee at the time of the injury shall be taken as a basis upon which to compute compensation or death benefits, and shall be determined as follows:

1. If the injured employee shall have worked in the employment in which he was working at the time of the accident, whether for the same employer or not, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hun-

dred times the average daily wage or salary which he shall have earned in such employment during the days when so employed;

2. If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings shall consist of three hundred times the average daily wage or salary which an employee of the same class working substantially the whole of such immediately preceding year in the same or in a similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed;

3. If either of the foregoing methods of arriving at the annual average earnings of an injured employee cannot reasonably and fairly be applied, such annual earnings shall be such sum as, having regard to the previous earnings of the injured employee and of other employees of the same or most similar class, working in the same or most similar employment in the same or neighboring locality, shall reasonably represent the annual earning capacity of the injured employee in the employment in which he was working at the time of the accident;

4. The average weekly wages of an employee shall be one-fifty-second part of his average annual earnings. * * *

§ 15. Schedule in case of disability.—The following schedule of compensation is hereby established:

1. Total permanent disability. In case of total disability adjudged to be permanent, sixty-six and two-thirds per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability. Loss of both hands, or both arms, or both feet, or both legs, or both

eyes, or of any two thereof shall, in the absence of conclusive proof to the contrary, constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

2. Temporary total disability. In case of temporary total disability, sixty-six and two-thirds per centum of the average weekly wages shall be paid to the employee during the continuance thereof, but not in excess of three thousand five hundred dollars, except as otherwise provided in this chapter.

3. Permanent partial disability. In case of disability partial in character but permanent in quality the compensation shall be sixty-six and two-thirds per centum of the average weekly wages and shall be paid to the employee for the period named in the schedule as follows:

Thumb. For the loss of a thumb, sixty weeks.

First finger. For the loss of a first finger, commonly called the index finger, forty-six weeks.

Second finger. For the loss of a second finger, thirty weeks.

Third finger. For the loss of a third finger, twenty-five weeks.

Fourth finger. For the loss of a fourth finger, commonly called the little finger, fifteen weeks.

Phalange of thumb or finger. The loss of the first phalange of the thumb or finger shall be considered to be equal to the loss of one-half of such thumb or finger, and compensation shall be one-half of the amount above specified. The loss of more than one phalange shall be considered as the loss of the entire thumb or finger; provided, however, that in no case shall the amount received for more than one finger exceed the amount provided in this schedule for the loss of a hand.

Great toe. For the loss of a great toe, thirty-eight weeks.

Other toes. For the loss of one of the toes other than the great toe, sixteen weeks.

Phalange of toe. The loss of the first phalange of any toe shall be considered to be equal to the loss of one-half of said toe, and the compensation shall be one-half of the amount specified. The loss of more than one phalange shall be considered as the loss of the entire toe. * * *

Hand. The loss of a hand, two hundred and forty-four weeks.

Arm. For the loss of an arm, three hundred and twelve weeks.

Foot. For the loss of a foot, two hundred and five weeks.

Leg. For the loss of a leg, two hundred and eighty-eight weeks.

Eye. For the loss of an eye, one hundred and twenty-eight weeks.

Loss of use. Permanent loss of the use of a hand, arm, foot, leg, eye, thumb, finger, toe, or phalange, shall be considered as the equivalent of the loss of such hand, arm, foot, leg, eye, thumb, finger, toe or phalange. * * *

Amputations. Amputations between the elbow and the wrist shall be considered as the equivalent of the loss of a hand. Amputation between the knee and the ankle shall be considered as the equivalent of the loss of a foot. Amputation at or above the elbow shall be considered as the loss of an arm. Amputation at or above the knee shall be considered as the loss of the leg.

The compensation for the foregoing specific injuries shall be in lieu of all other compensation,

except the benefits provided in section thirteen of this chapter.

In case of an injury resulting in serious facial or head disfigurement the Commission may in its discretion, make such award or compensation as it may deem proper and equitable, in view of the nature of the disfigurement, but not to exceed three thousand five hundred dollars.

Other cases. In all other cases in this class of disability, the compensation shall be sixty-six and two-thirds per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the Commission on its own motion or upon application of any party in interest.

4. Temporary partial disability. In case of temporary partial disability, except the particular cases mentioned in subdivision three of this section, an injured employee shall receive sixty-six and two-thirds per centum of the difference between his average weekly wages and his wage earning capacity thereafter in the same employment or otherwise during the continuance of such partial disability, but not to exceed when combined with his decreased earnings the amount of wages he was receiving prior to the injury, and not to exceed in total the sum of three thousand five hundred dollars, except as otherwise provided in this chapter.

5. Limitation. The compensation payment under subdivisions one, two and four and under subdivision three except in case of the loss of a hand, arm, foot, leg or eye, shall not exceed fifteen dollars per week nor be less than five dollars per week; the compensation payment under subdivision three in case of the loss of a hand, arm, foot, leg

or eye, shall not exceed twenty dollars per week nor be less than five dollars a week; provided, however, that if the employee's wages at the time of injury are less than five dollars per week he shall receive his full weekly wages.

6. Previous disability. The fact that an employee has suffered previous disability or received compensation therefor shall not preclude him from compensation for a later injury nor preclude compensation for death resulting therefrom; but in determining compensation for the later injury or death his average weekly wages shall be such sum as will reasonably represent his earning capacity at the time of the later injury, provided, however, that an employee who is suffering from a previous disability shall not receive compensation for a later injury in excess of the compensation allowed for such injury when considered by itself and not in conjunction with the previous disability.

7. Permanent total disability after permanent partial disability. If an employee who has previously incurred permanent partial disability through the loss of one hand, one arm, one foot, one leg, or one eye, incurs permanent total disability through the loss of another member or organ, he shall be paid, in addition to the compensation for permanent partial disability provided in this section and after the cessation of the payments for the prescribed period of weeks special additional compensation for the remainder of his life to the amount of sixty-six and two-thirds per centum of the average weekly wage earned by him at the time the total permanent disability was incurred. Such additional compensation shall be paid out of a special fund created for such purpose in the following manner: The insurance carrier shall pay to the state treasurer for every case of injury causing death in which there are no persons entitled to

compensation the sum of one hundred dollars. The state treasurer shall be the custodian of this special fund and the Commission shall direct the distribution thereof.

§ 16. Death benefits.—If the injury causes death, the compensation shall ke known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:

1. Reasonable funeral expenses not exceeding one hundred dollars.

2. If there be a surviving wife (or dependent husband) and no child of the deceased under the age of eighteen years, to such wife (or dependent husband) thirty per centum of the average wages of the deceased during widowhood (or dependent widowerhood) with two years' compensation in one sum, upon remarriage; and if there be surviving child or children of the deceased under the age of eighteen years, the additional amount of ten per centum of such wages for each such child until of the age of eighteen years; in case of the subsequent death of such surviving wife (or dependent husband) any surviving child of the deceased employee, at the time under eighteen years of age, shall have his compensation increased to fifteen per centum of such wages, and the same shall be payable until he shall reach the age of eighteen years; provided that the total amount payable shall in no case exceed sixty-six and two-thirds per centum of such wages. The Commission may in its discretion require the appointment of a guardian for the purpose of receiving the compensation of a minor child. In the absence of such a requirement by the Commission the appointment of a guardian for such purposes shall not be necessary.

3. If there be surviving child or children of the deceased under the age of eighteen years, but no

surviving wife (or dependent husband) then for the support of each such child until of the age of eighteen years, fifteen per centum of the wages of the deceased, provided that the aggregate shall in no case exceed sixty-six and two-thirds per centum of such wages.

4. If there be no surviving wife (or dependent husband) or child under the age of eighteen years or if the amount payable to surviving wife (or dependent husband) and to children under the age of eighteen years shall be less in the aggregate than sixty-six and two-thirds per centum of the average wages of the deceased, then for the support of grandchildren or brothers and sisters under the age of eighteen years, if dependent upon the deceased at the time of the accident, fifteen per centum of such wages for the support of each such person until the age of eighteen years; and for the support of each parent, or grandparent, of the deceased, if dependent upon him at the time of the accident, twenty-five per centum of such wages during such dependency. But in no case shall the aggregate amount payable under this subdivision exceed the difference between sixty-six and two-thirds per centum of such wages, and the amount payable as hereinbefore provided to surviving wife (or dependent husband) or for the support of surviving child or children.

Any excess of wages over one hundred dollars a month shall not be taken into account in computing compensation under this section. All questions of dependency shall be determined as of the time of the accident.

* * * * * * * * * *

§ 20. Determination of claims for compensation.— At any time after the expiration of the first fourteen days of disability on the part of an injured employee, or at any time after his death, a

claim for compensation may be presented to the employer and if rejected or if within ten days after presentation, a report containing an agreement for compensation be not made and filed with the Commission as provided by this section, the claim may be presented to the Commission. The Commission shall have full power and authority to determine all questions in relation to the payment of claims presented to it for compensation under the provisions of this chapter. The Commission shall make or cause to be made such investigation as it deems necessary, and upon application of either party, shall order a hearing, and within thirty days after a claim for compensation is submitted under this section, or such hearing closed, shall make or deny an award, determining such claim for compensation, and file the same in the office of the Commission. The Commission may before making an award, require the claimant to appear before an arbitration committee appointed by it and consisting of one representative of employees, one representative of employers, and either a member of the Commission or a person specifically deputized by the Commission to act as chairman, before which the evidence in regard to the claim shall be adduced and by which it shall be considered and reported upon. Immediately after such filing the Commission shall send to the parties a copy of the decision. Upon a hearing pursuant to this section either party may present evidence and be represented by counsel. The decision of the Commission shall be final as to all questions of fact, and, except as provided in section twenty-three, as to all questions of law. When a claim is presented to an employer, and the employer and employee, or in case of death, his principal dependent, enter into an agreement for the payment of compensation therefor pursuant to this chapter, a joint report of such claim containing such agreement shall be made to the Com-

mission upon a form prepared by it and signed by the employer and employee, or in case of death his principal dependent. The Commission shall examine such report and approve the same when the terms are strictly in accordance with this chapter and such approval shall constitute an award. However, the Commission may make an award in the manner provided in this section in any case, and if the terms of the award vary from the joint report, the employer shall comply with the award. In case of unfair dealing or of bad faith on the part of the employer under this section, the Commission may impose a penalty of not more than ten per centum of the award.

* * * * * * * * * *

§ 21. Presumptions.— In any proceeding for the enforcement of a claim for compensation under this chapter, it shall be presumed in the absence of substantial evidence to the contrary:

1. That the claim comes within the provisions of this chapter;

2. That sufficient notice thereof was given;

3. That the injury was not occasioned by the willful intention of the injured employee to bring about the injury or death of himself or of another;

4. That the injury did not result solely from the intoxication of the injured employee while on duty.

§ 22. Modification of award.— Upon its own motion or upon the application of any party in interest, on the ground of a change in conditions, the commission may at any time review any award, and, on such review, may make an award ending, diminishing or increasing the compensation previously awarded, subject to the maximum or minimum provided in this chapter, and shall state its

conclusions of fact and rulings of law, and shall immediately send to the parties a copy of the award. No such review shall affect such awards as regards any moneys already paid.

* * * * * * * * * * *

§ 25. Compensation, how payable.— Compensation under the provisions of this chapter shall be payable periodically by the employer, in accordance with the method of payment of the wages of the employee at the time of his injury or death, and shall be so provided for in any award; but the commission may determine that any payments may be made monthly or at any other period, as it may deem advisable. The state fund or insurance corporation in which an employer is insured shall, within ten days after demand by such employer and on the presentation of evidence of payment of compensation in accordance with this chapter, reimburse the employer therefor. An injured employee, or in case of death his dependents or personal representative, shall give receipts for payment of compensation to the employer paying the same and such employer shall forward receipts therefor promptly to the commission. The commission, whenever it shall so deem advisable, may commute such periodical payments to one or more lump sum payments to the injured employee, or, in case of death, his dependents, provided the same shall be in the interest of justice.

* * * * * * * * * * *

§ 27. Depositing future payments.— If an award under this chapter requires payment of death benefits or other compensation by an insurance carrier or employer in periodical payments, the commission may, in its discretion, at any time, any provision of this chapter to the contrary notwithstanding, compute and permit or require to be paid into the state fund an amount equal to the

present value of all unpaid death benefits or other compensation in cases in which awards are made for total permanent or permanent partial disability for a period of one hundred and four weeks or more, for which liability exists, together with such additional sum as the commission may deem necessary for a proportionate payment of expenses of administering the fund so created. The moneys so paid in for all death benefits or other compensation to constitute one aggregate and indivisible fund; and thereupon such employer or insurance carrier shall be discharged from any further liability under such award and payment of the same as provided by this chapter shall be assumed by the special fund so created. All computations made by the commission shall be upon the basis of the survivorship annuitants' table of mortality, the remarriage tables of the Dutch Royal Insurance Institution and interest at three and one-half per centum per annum.

ARTICLE 3.

Security for Compensation.

§ 50. Security for payment of compensation.—An employer shall secure compensation to his employees in one of the following ways:

1. By insuring and keeping insured the payment of such compensation in the state fund, or

2. By insuring and keeping insured the payment of such compensation with any stock corporation or mutual association authorized to transact the business of workmen's compensation insurance in this state. If insurance be so effected in such a corporation or mutual association the employer shall forthwith file with the commission, in form prescribed by it, a notice specifying the name of such insurance corporation or mutual association

and such information regarding the policies as the commission may require.

3. By furnishing satisfactory proof to the commission of his financial ability to pay such compensation for himself, in which case the commission may, in its discretion, require the deposit with the commission of securities of the kind prescribed in section thirteen of the insurance law, in an amount to be determined by the commission, to secure his liability to pay the compensation provided in this chapter. * * * The commission shall have the authority to revoke its consent furnished under this section at any time for good cause shown.

If an employer fail to comply with this section, he shall be liable to a penalty during which such failure continues of an amount equal to the pro rata premium which would have been payable for insurance in the state fund for such period of noncompliance to be recovered in an action brought by the commission.

* * * * * * * * * *

§ 52. Effect of failure to secure compensation.— Failure to secure the payment of compensation shall constitute a misdemeanor and have the effect of enabling the injured employee, or in case of death, his dependents or legal representatives, to maintain an action for damages in the courts, as prescribed by section eleven of this chapter.

§ 53. Release from all liability.— An employer securing the payment of compensation by contributing premiums to the state fund shall thereby become relieved from all liability for personal injuries or death sustained by his employees, and the persons entitled to compensation under this chapter shall have recourse therefor only to the state fund and not to the employer. An employer

shall not otherwise be relieved from the liability for compensation prescribed by this chapter except by the payment thereof by himself or his insurance carrier.

ARTICLE 4.

State Workmen's Compensation Commission.

§ 68. Technical rules of evidence or procedure not required.— The commission or a commissioner or deputy commissioner in making an investigation or inquiry or conducting a hearing shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to ascertain the substantial rights of the parties.

* * * * * * * * * *

§ 74. Jurisdiction of commission to be continuing.— The power and jurisdiction of the commission over each case shall be continuing, and it may, from time to time, make such modification or change with respect to former findings or orders relating thereto, as in its opinion may be just.

ARTICLE 6.

Miscellaneous Provisions.

§ 118. Unconstitutional provisions.— If any section or provision of this chapter be decided by the courts to be unconstitutional or invalid, the same shall not affect the validity of the chapter as a whole or any part thereof other than the part so decided to be unconstitutional or invalid.

APPENDIX "B."

AMENDMENT TO THE CONSTITUTION OF THE STATE OF NEW YORK.

Article I, § 19. Workmen's compensation.—"Nothing contained in this Constitution shall be construed to limit the power of the Legislature to enact laws for the protection of the lives, health, or safety of employees; or for the payment, either by employers, or by employers and employees or otherwise, either directly or through a State or other system of insurance or otherwise, of compensation for injuries to employees, or for death of employees resulting from such injuries without regard to fault as a cause thereof, except where the injury is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty; or for the adjustment, determination and settlement, with or without trial by jury, of issues which may arise under such legislation; or to provide that the right of such compensation, and the remedy therefor shall be exclusive of all other rights and remedies for injuries to employees or for death resulting from such injuries; or to provide that the amount of such compensation for death shall not exceed a fixed or determinable sum; provided that all moneys paid by an employer to his employees or their legal representatives, by reason of the enactment of any of the laws herein authorized, shall be held to be a proper charge in the cost of operating the business of the employer."

Adopted by the people November 4, 1913; in effect January 1, 1914.

OCT 10 1919
JAMES D. MAHER,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1919.

No. 374.

NEW YORK CENTRAL RAILROAD COMPANY,
Plaintiff in error,

against

MICHAEL BIANC,
Defendant in error.

IN ERROR TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, THIRD DEPARTMENT.

CHARLES D. NEWTON,
Attorney-General.

E. C. AIKEN,
Deputy Attorney-General.

Of Counsel for the State Industrial Commission.

Brief for the State Industrial Commission

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919

No. 374.

NEW YORK CENTRAL RAILROAD COMPANY,
Plaintiff-in-Error,

against

MICHAEL BIANC,
Defendant-in-Error.

IN ERROR TO THE SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT OF THE STATE OF NEW YORK.

STATEMENT OF CASE

This is a writ of error to review a judgment of the Court of Appeals of the State of New York which affirmed an order of the Appellate Division, Third Department, unanimously affirming an award of the State Industrial Commission made to the claimant of forty-eight weeks' compensation from January 1, 1917, to December 14, 1917, and also the sum of $1,500 for serious facial and head disfigurement resulting from injuries sustained on December 18, 1916 (fol. 31). The claimant was a machinists' helper working at the West Albany shops of the defendant (fol. 2). While work-

ing under an engine, he slipped back against a kerosene torch, setting his clothes afire (fol. 3). He received severe burns on the back of his head and back, limbs and body (fols. 5, 6, 7). There seems to be no dispute as to the forty-eight weeks allowed for disability as this was conceded by the counsel for the defendant (fol. 13). Mr. Brown, counsel for the railroad, thought that award was about right (fol. 19). Question arose, however, upon the claim for facial disfigurement which the defendant contested, although there was no question but what there was such disfigurement. In addition to the facial disfigurement, the claimant has an extensive scar on the buttock which causes pain after prolonged sitting or in some movements of the right leg (fol. 18). Nothing, however, is included for this injury. The disfigurement to the face is described by the attending physician, Dr. Vander Veer (fol. 4) and by a special examiner, Dr. Boyle (fol. 7), also by Dr. Lewi (fol. 24). Dr. Vander Veer says that there is permanent disfigurement of the head and face. That both ears are distorted by burns fol. 4). Dr. Boyle says that both ears show marks of deformity and that there is marked cosmetic disfigurement in the occipital region. The claimant was subject to a physical examination by the commissioners who found that the scars on the back of the head and neck have entirely denuded his head of hair, at least half way up his head in the rear, and that there are serious burns on both ears by which they are badly shriveled (fol. 21). It appears that the claimant's hearing is affected. That he can hear hardly anything in the morning (fol. 21).

ARGUMENT

POINT I

No valid Constitutional objection has been raised and the award for facial disfigurement was properly made.

The Workmen's Compensation Law of New York was thoroughly discussed before this court on argument and reargument, and considered in the case of *New York Central R. R. Company* v. *White*, 243 U. S. 188, and a very exhaustive opinion written by Mr. Justice Pitney and concurred in by the entire court.

The gist of that opinion was that the common law gave the workman compensation for damages when the employer was at fault. That that remedy was taken away and a remedy given for damages received, irrespective of fault; that the Legislature had the right to place such a burden upon the employer, providing the same was reasonable.

Since the decision of that case this court has on two occasions had to deal with Workmen's Compensation Laws of other states. In the case of *Middleton* v. *Texas Power & Light Company*, this court had the question raised by the employe that the Texas Employers Liability Act was in conflict with the due process and equal protection provisions of the Fourteenth Amendment. The court, through Mr. Justice Pitney, stated in reference to the compensation allowed under said statute:

> "Such compensation is the statutory substitute for damages otherwise recoverable because of injuries suffered by an employe, or his death occasioned by such injuries, when due to the negligence of the employer or his servants; it being declared that the employe of a subscribing employer, or his representatives or beneficiaries in case of his death, shall have no cause of action against the employer for damages except where a death is caused by the wilful act or omission or gross negligence of the employer."

Again in the case of *Arizona Copper Company* v. *Hammer*, this court had under consideration the Employers Liability Law and the Workmen's Compulsory Compensation Law of Arizona. The Employers' Liability Law of Arizona designated certain employments as inherently hazardous and dangerous to workmen, and imposed upon the employer, without regard to the question of fault, liability and compensatory damages for accidental personal injuries or death of an employee arising out of and in the course of the employment and due to the condition or conditions of the occupation, in cases where such injury of the employe shall not have been caused by his own negligence.

Regarding this law, the court, through Mr. Justice Pitney says:

> "We are unable to say that the Employers' Liability Law of Arizona, in requiring the employer in hazardous industries to assume — so far as pecuniary consequences go — the entire risk of injury to the employee attributable to accidents arising in the course of the employment, and due to its inherent

conditions, exceeds the bounds of permissible legislation, or interferes with the constitutional rights of the employer."

It is further stated:

"It is objected that the responsibility of the employer under this statute is unlimited; but this is not true except as it is true of every action for compensatory damages where the amount awarded varies in accordance with the nature and extent of the damages for which compensation is made. It is said that in actions by employees against employers juries are prone to render extravagant verdicts. The same thing has been said, and with equal reason, concerning actions brought by individuals against railroad companies, traction companies, and other corporations."

And further:

"The statute says to the employer, in effect: 'You shall not employ your fellowmen in a hazardous occupation for gain, you being in a position to reap a reward in money through selling the produce of their toil, unless you come under an obligation to make appropriate compensation in money in case of their death or injury due to the conditions of the occupation.' The rule being based upon reasonable grounds affecting the public interest, being established in advance, and applicable to all alike under similar circumstances, there is, in our opinion, no infringement of the fundamental rights protected by the 14th Amendment.

"Some expressions contained in our opinion in the *White Case* (243 U. S. 203–205) are treated in argument as if they were equivalent to saying that if a state, making a legis-

lative adjustment of employers' liability, departs from the common-law system of basing responsibility upon fault, it must confine itself to a limited compensation, measured and ascertained according to the methods adopted in the compensation acts of the present day. Of course nothing of the kind was intended. In a previous part of the opinion (pp. 196–200) it had been shown that the employer had no constitutional right to continued immuity from liability in the absence of negligence, nor to have the fellow-servant rule and the rules respecting contributory negligence and assumption of risk remain unchanged. The statutory plan of compensation for injured workmen and the dependents of those fatally injured — an additional feature at variance with the common law — was then upheld; but, of course, without saying that no other would be constitutional. For if, as we held in that case, the novel statutory scheme of awarding compensation according to a prearranged scale is sustainable, it follows, perhaps *a fortiori* that the Arizona method of ascertaining the compensation according to the facts of each particular case — substantially the common-law method — is free from objection on constitutional grounds. Indeed, if a state recognizes or establishes a right of action for compensation to injured workmen upon grounds not arbitrary or fundamentally unjust, the question whether the award shall be measured as compensatory damages are measured at common law, or according to some prescribed scale reasonably adapted to produce a fair result, is for the state itself to determine. Where the compensation should be paid in a single sum after judgment recovered, as is required by the Arizona Employers' Liability Law just as under the common-law system in the case of a judgment

> based upon negligence, or whether it would be more prudent to distribute the award by instalment payments covering the period of disability or of need, likewise is for the state to determine, and upon this the plaintiffs in error can raise no constitutional question."

And Mr. Justice Holmes, in his concurring opinion also says:

> "But if it is thought to be public policy to put certain voluntary conduct at the peril of those pursuing it, whether in the interest of safety or upon economic or other grounds, I know of nothing to hinder. A man employs a servant at the peril of what that servant may do in the course of his employment, and there is nothing in the Constitution to limit the principle to that instance."

The argument of the plaintiff-in-error to the effect that an award for disfigurement deprives the employer of his property without due process of law should be turned about. If the employer's argument is sound, the employee is the one that is deprived of property without due process of law and not the employer. The employer contends, of course, that the Workmen's Compensation Law is constitutional and that it is intended to and does take the place exclusively of the remedy for negligence formerly existing against the railroad company for injuries received by its employees. (See *Shanahan* v. *Monarch Engineering Co.*, 219 N. Y. 469). Supposing, however, an employee receives an injury which does not disable him from working but removes say all the hair from his head or smashes his nose or cuts off his ears. If the employee sues the employer for this and it is a case where there is

negligence, the employer will reply that there is no remedy against the employee for the reason that the Workmen's Compensation Law is exclusive. The employee then petitions for compensation under the Workmen's Compensation Law and is met by the argument that the employer's property is taken without due process of law as there is no diminution of earning power. The employee, therefore, is deprived of any remedy against his employer for an actionable injury. It cannot be that the reasoning of Mr. Justice Pitney in the White case can be twisted into any such conclusion.

The argument of the appellant that facial disfigurement is wholly unrelated to ability to work will not bear the test of common experience. It is common knowledge and observation that an employer is influenced by a man's personal appearance and that serious damage to the face will continue to be a detriment to a man or woman's ability to earn during his or her entire life. It may be conceded that facial disfigurement is a special and unique form of disability; that it may not disable a man from actual manual labor as is the case with some other accidents. It is on account of this special consideration that the law has taken such cases out of the usual category of disabling accidents where award is made by the week for the disability suffered. Therefore, the general purpose of the law is for a weekly compensation, but the special feature of facial disfigurement is merely an exception as to the manner of payment for disability while the general considerations for the substitution of a theory of compensation for actions for negligence still obtain.

Awards for facial disfigurement, however, are in general accord with other parts of this law. The law provides for a definite amount for permanent partial disability, for the loss of any fingers or of any toes, for the loss of a leg, hand and arm, or an eye. All these are losses of portions of the body and similar to the loss of a nose or an ear. A man may lose one toe or several toes, without impairing his earning capacity. The loss of an eye is a loss of a part of the face. Of course, the loss of an eye is much more apt to interfere with a man's earning power than the loss of an ear or possibly a nose, but it is only a matter of degree.

The argument of plaintiff-in-error proceeds upon the assumption that disfigurement has no relation to earning capacity. He further assumes that:

> "Reparation for diminution or destruction of earning power being, then, the basis of constitutional sanction for compulsory payment of compensation, in the absence of fault on an employer's part, the award for disfigurement, under review herein, cannot stand."

By implication he assumes also, that in this or other cases of facial disfigurement, proof might be made of diminution of earning power on account of facial disfigurement.

It is not for this court to pass upon any such question of fact. The question here is as to the law itself — does it invade the constitutional rights?

Judge Cardozo says in the opinion in the case of the *American Knife Company* v. *Sweeting:*

> "One cannot defeat a statute by a presumption that in its enactment the truths of

> life have been ignored. The presumption is, on the contrary, that they have been perceived and heeded. But one of the truths of life is that serious facial disfigurement has a tendency to impair the earning power of its victims. In some callings it would rule out altogether an applicant for employment. In most it would put him at a disadvantage when placed in competition with others."

In the case of *Ball* v. *William Hunt & Sons, Ltd.*, 5 B. W. C. C. 459, the House of Lords had before it the case of a workman who was blind in one eye, but was to all appearances two-eyed. As the result of a new accident the blind eye had to be removed and he could no longer conceal his infirmity. He was then quite unable to obtain work through either his old employers or from anywhere else. The House of Lords held that incapacity for work includes inability to get work, and that the man was entitled to compensation for the disfigurement.

All the features of the Compensation Law of New York were before this court upon the first argument and upon the reargument. The amendment in question had been adopted and was a part of the law at that time, being an amendment to subdivision 3 of section 15, added by Chapter 22, Laws of 1916, as follows:

> "In case of an injury resulting in serious facial or head disfigurement the commission may in its discretion, make such award or compensation as it may deem proper and equitable, in view of the nature of the disfigurement, but not to exceed three thousand five hundred dollars."

Counsel for the plaintiff-in-error contends (page 10), that due process of law contemplates

that damages shall be fixed and awarded, if at all, by a jury and not by a court. The amendment to the Constitution of the State of New York, however, provides "for the adjustment, determination and settlement with or without trial by jury of issue which may arise under such legislation."

It is recognized by a long list of decisions that the first ten amendments to the United States Constitution are not operative on the states:

Baron v. *Baltimore*, 7 Pet. 243.
Spies v. *Illinois*, 123 U. S. 131
Barrington v. *Missouri*, 205 U. S. 483.
Twining v. *New Jersey*, 211 U. S. 93.

THE FACE

Counsel for plaintiff-in-error has spoken of the disfigurement provision of the law as the *beauty clause*, as if it were of minor importance — a thing of shreds and patches — implying that it did not much matter if a man should lose his face, provided his earning ability were not diminished. We have only to obtain the Chinese viewpoint to see that to lose one's face is the direst of calamities.

The soldier in the great war was more concerned over injury to the face than any other part of his body.

To woman the face is her dearest possession. Powder and rouge and paste, and divers other artifices are used to preserve it. The beauty of the paintings of the old masters is centered in the face. A half a million dollars would not purchase the Madonna di San Sisto of Raphael or the Mona Lisa of Leonardo da Vinci.

The face stamps the individual so that he may be recognized. As no two faces, so no two souls are absolutely alike. An unnumbered series of individual faces are formed after the same general type, without making any one the exact counterpart of the other.

Helen of Troy formed the motif of Homer's Iliad. As Marlowe says:

"Is this the face that launched a thousand ships
And burned the topless towers of Ilium?"

The face is the expression of the mind. It is that physical portion of us that distinguishes us from the brutes.

"See what a grace was seated on this brow
Hyperion's curls; the front of Jove himself;
An eye like Mars, to threaten and command;
A station like the herald Mercury
New-lighted on a heaven-kissing hill,—
A combination and a form indeed
Where every god did seem to set his seal
To give the world assurance of a man."

In the face are contained four senses which are the sources of pleasurable delight.

"Oh what a noble gift of heaven is the light of the eye," says Schiller.

With the ear we hear oftentimes "the still, sad music of humanity."

With the nose we may inhale all the perfumes of Araby. Properly formed it fits in with the scheme of personal beauty.

Cyrano de Bergerac's nose made it impossible for him to try to win the love of Roxane.

Then to some come the pleasure of taste, the delights of eating and drinking. Even the poet Keats is said to have put pepper on his tongue

that he might enjoy to a more superlative degree the coolness of the claret which he drank.

The sense of touch reaches consummation in the face, whether it be the passionate kiss of love, the chaste kiss of friendship or the Judas kiss of treachery.

The history of the world might be written in faces,— the snub nose of Socrates — the warty face of Cromwell — the majestic head of Washington — the strong, sad features of Lincoln.

Then there are the faces of women who have troubled the peace of the world — Helen of Troy and Cleopatra, Beatrice Cenci and Beatrice d'Este, Lady Hamilton and Aspasia, Queen Elizabeth, the virgin but virile Queen of England, and Joan of Arc, the martyred Maid of France.

We all look forward to see the faces of these men and women of history, as well as those of personal friends, for

"With the morn those angel faces smile
Which I have loved long since and lost awhile."

POINT II

THE ORDER OF THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, AFFIRMING THE AWARD OF THE WORKMEN'S COMPENSATION COMMISSION SHOULD BE AFFIRMED.

Respectfully submitted,
CHARLES D. NEWTON,
Attorney-General.

E. C. AIKEN,
Deputy Attorney-General.
Of Counsel for the State Industrial Commission.